

**A REPORT ON CANADA'S CONSPIRACY LAW:
1889 - 2001 AND BEYOND**

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**(With the assistance of
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A. SCOPE OF REPORT

In June 2001 the Commissioner of Competition ("*Commissioner*") retained the authors¹ to consider, and report on, a proposal for amending section 45 of the *Competition Act*. We were asked to consider a "two-track" system for dealing with conspiracies, one track being civil and the other criminal. While we have been guided by our particular terms of reference, it should be noted that the Commissioner did not suggest that we recommend a two-track system.² Accordingly, our report and recommendation is of our own making for which we are solely responsible.

We began our work with a fundamental question: Is Canada's conspiracy law working effectively? After considerable research and study (see the Study, attached as Appendix 1), we concluded that the law is not effective. Further, we concluded that the law has never been very effective and may be even less effective in the future. Accordingly, our report tables a code or model for reform (termed the "Draft Code"). Much of this report outlines various components of the Draft Code, as well as examples that help to illustrate how the Draft Code would treat different forms of cooperative behaviour between or among competitors, such as joint ventures.³

Naturally, we have been unable to confine our work strictly to section 45 and our report also considers a number of other provisions of the *Competition Act*, such as sections 46, 61, 77 and 92. Our report does not, however, consider private rights of access, civil actions, rules of evidence or criminal penalties, nor does it propose a restructuring of the administrative or judicial structures within which conspiracies⁴ are investigated, prosecuted and adjudicated. No doubt, such

¹ The efforts of Huy Do, Peter Cho and Viktor Hohots in the preparation of this report are gratefully acknowledged. In addition, William C. Holmes kindly offered some comments on the report, which, among other things, helped to improve the accuracy of our discussion of American antitrust law; William Stanbury offered some useful guidance on performing the Study that is found in Appendix 1; and J. Anthony VanDuzer suggested some reference sources that otherwise might have been missed. The reader should note that many primary and secondary sources are cited throughout this report in connection with various propositions, arguments, discussions and examples. Such references do not necessarily support any arguments or positions advanced in this report, but are considered relevant to the particular discussion.

² Our report does not consider, nor therefore critique, Bill C-472, *An Act to Amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence*, 2nd Sess., 36th Parl., 1999-00 (hereafter "*Bill C-472*"). Indeed, we have deliberately developed the Draft Code without reference to the Bill, nor to other examples of alternative legislative drafting, such as those offered by P.L. Warner and M.J. Trebilcock, "Rethinking Price-Fixing Law," 38 McGill L.J. 679 (hereafter "Warner & Trebilcock") and T. Kennish and T.W. Ross, "Toward a New Canadian Approach to Agreements Between Competitors," [1997] Can. Bus. L.J. 22 (hereafter "*Kennish & Ross*"), in an effort to provide a fresh perspective on the subject.

³ We use the phrase "joint venture" throughout this report to refer to all forms of cooperative behaviour effected through an agreement or arrangement that contemplates (i) joint control by the participants over the activities of the joint venture, (ii) joint contribution to the venture, whether in the form of funding, tangible assets, intellectual property, operational services or otherwise, and (iii) a commercially limited and defined scope of activities. Our definition is similar to that found in section 112 of the *Competition Act*, R.S.C. 1985, c. C-34 (hereafter "*Competition Act*"). See also *Competition Act*, ss. 95(1)(b), (c) and (d); Bill C-256, *An Act to Promote Competition, to Provide for the General Regulation of Trade of Commerce, to Promote Honest and Fair Dealing, to Establish a Competitive Practices Tribunal and the Office of Commissioner, to Repeal the Combines Investigation Act and to Make Consequential Amendments to the Bank Act*, 3rd Sess., 28th Parl., 1970-71, s. 2(1)("joint venture") (hereafter "*Bill C-256*"); *Investment Canada Act*, R.S. 1985, c. 28 (1st Supp.), s. 3("joint venture").

⁴ The term "conspiracy" is used throughout this report to mean all agreements or arrangements between or among two or more competitors that might be captured by the language of section 45 of the *Competition Act* (when read without the words "unduly" or "unreasonably"), §1 of the *Sherman Act*, 15 U.S.C., or Article 81(1) of the *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. (hereafter "*Treaty of Rome*"), irrespective of the impact of such agreement or arrangement on competition. We recognize the potential scope of our definition, but suggest that little turns on it.

endeavours would have strengthened our report, however, we were confined by our particular terms of reference.⁵

B. BACKGROUND

1. The Canadian Enforcement Record

(a) General

The first piece of Canadian competition law legislation was introduced by Parliament in 1889 and was called "An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade."⁶ The legislation was introduced in a common law environment in which conspirators could seek the assistance of Canadian courts in forcing "cheaters" to adhere to formal price-fixing or output limitation agreements.⁷ The legislation was aimed at conspiracies in restraint of trade and, in particular, agreements to fix prices or limit output. The fundamental elements of the law of conspiracy have changed only modestly since 1889.⁸

The Canadian record of conspiracy enforcement for the period of 1889 to 1990 has been examined in detail by Stanbury and others. Some of the statistics assembled through such efforts are as follows:

- For the period between 1890 and 1969 (a period for which statistics were available), Canada had 70 conspiracy cases compared to over 1250 in the United States;⁹ and
- During the period between 1889 and 1983, the Crown "won" 84 out of the 112 conspiracy cases (75%) that were prosecuted.¹⁰

It is necessary to examine these statistics in greater detail, however, in order to appreciate their significance.

⁵ One of the endeavours that would have strengthened this report is a complete rewriting of the *Competition Act* to demonstrate how the existing provisions of the *Act* could be revised to accommodate the Draft Code. In this regard, it is our view that the *Competition Act* has been severely damaged in its linguistic integrity through decades of *ad hoc* amendments and a comprehensive restatement of the law is long overdue.

⁶ S.C. 1889, c. 41.

⁷ *Ontario Salt v. Merchant Salt Co.*, (1871) 18 Gr. 540.

⁸ Most of the changes that have taken place represent attempts to clarify the law. See Kennish & Ross, note 2, *supra*, at 23.

⁹ See W.T. Stanbury, "Chapter 6 - Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform" in R. S. Khemani & W. T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 61 at 128 (hereafter "*Stanbury*"). For the period of 1991-1999 (a more recent period for which statistics were available), Canada had 22 cases compared to over 500 in the U.S. See U.S. Department of Justice, "Antitrust Division Workload Statistics: FY 1991-2000" found at www.usdoj.gov/atr/public/7344.htm (accessed Aug. 6, 2001); H. Chandler and R. Jackson, "Beyond Merrimont and Diversion: The Treatment of Conspiracies Under Canada's Competition Act" found at www.strategis.ic.gc.ca/SSG/ct01767e.htm (hereafter "*Chandler & Jackson*"). We note that, until 1900, only "unlawful" conspiracies were illegal, which effectively rendered the Canadian legislation unenforceable. See Stanbury, *ibid.*, at 63.

¹⁰ C. Green, *Canadian Industrial Organization and Policy*, 3rd ed. (Toronto: McGraw Hill Ryerson, 1990) at 250-51 (hereafter "*Green*").

(b) *Number of Prosecutions*

Clearly, the low number of prosecutions in Canada would tend to suggest that Canada has been less active than the United States in bringing conspiracy cases to the courts. One obvious reason for this is the difference between the size of the two economies. Nevertheless, Stanbury would argue that the ratio of 18:1 does not reflect the relative sizes of our two economies (approximately 10:1) and, further, that the ratio should be even lower than the relative size of our two economies might suggest because the *number of markets* in Canada, as well as the *mix of industries*, is much higher as a percentage of the number of markets and mix of industries in the United States.¹¹

Another possible explanation for the low number of conspiracy cases in Canada is that our prosecutors have done a better job of filtering out those cases that do not impact on competition and, therefore, do not merit prosecution. There are, however, a variety of reasons to doubt such an argument. First, more detailed statistics demonstrate that:

- of the 38 cases for which we have market share data, *only 4 appear to have involved market shares of less than 70%*; and
- of the 41 cases for which we have data, *over half of those cases (25) have been transparent (i.e., notorious or apparent conspiracies).*¹²

¹¹ Stanbury, note 9, *supra*, at 67-69.

¹² We have considered agreements or arrangements to be "transparent" where either:

- (i) the formation of the alleged conspiracy was transparent to the outside world, such as in *R. v. Container Materials Ltd.*, [1942] 1 D.L.R. 529 (S.C.C.), *affirming* [1941] 3 D.L.R. 145 (Ont. C.A.), *varying* [1940] 4 D.L.R. 293 (Ont. S.C.) (hereafter "*Container Materials*") (formation of marketing company), *R. v. Allied Chemical Ltd.* (1975), 69 D.L.R. (3d) 506, *quashed* 73 D.L.R. (3d) 767 (B.C.S.C.) (hereafter "*Allied Chemical*") (sales agency) and *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (S.C.C.), *affirming* 36 C.P.R. (3d) 173 (N.S.C.A.), *reversing* 32 C.P.R. (3d) 259 (N.S.S.C.) (hereafter "*PANS*") (powers of attorney); or
- (ii) the operation of the alleged conspiracy was transparent to the outside world, such as *The King v. Elliott* (1905), 9 C.C.C. 505 (Ont. C.A.) (hereafter "*Elliott*"), *The King v. Central Supply* (1907), 12 C.C.C. 371 (Ont. C.A.), *The King v. Clarke (No. 1)*, (1907) 14 C.C.C. 46 (Ont. C.A.) (hereafter "*Clarke*"), *The King v. Gage (No. 1)* (1907), 13 C.C.C. 415 (Man. K.B.), *affirmed* 13 C.C.C. 428 (Man. C.A.) (hereafter "*Gage*"), *The King v. Beckett* (1910), 15 C.C.C. 408 (Ont. H.C.) (hereafter "*Beckett*"), *A.G. for Ontario v. Canadian Wholesale Grocers*, [1923] 2 D.L.R. 617 (hereafter "*Wholesale Grocers*"), *R. v. Singer*, [1931] O.R. 202 (H.C.), *affirmed* [1931] O.R. 699 (C.A.), *affirmed* (1931), 56 C.C.C. 381 (S.C.C.), *R. v. Electrical Contractors Assn. of Ontario*, [1960] O.J. No. 256 (Q.L.) (Ont. H.C.), *affirmed* [1961] O.R. 265 (C.A.), *leave to appeal refused* [1961] S.C.R. ix (S.C.C.) (hereafter "*Electrical Contractors*"), *R. v. B.C. Pharmacists' Society* (1970), 17 D.L.R. (3d) 285 (hereafter "*B.C. Pharmacists*"), *R. v. B.C. Fruit Growers Assn.* (1985), 11 C.P.R. (3d) 183 (hereafter "*BC Fruit Growers*"), *R. v. Metropolitan Toronto Pharmacists' Association* (1984), 3 C.P.R. (3d) 233 (Ont. H.C.), *R. v. Aetna Insurance Ltd.*, [1978] S.C.R. 731 and *PANS* (open trade associations and, in some cases, open "collective exclusive dealing"); *R. v. McGavin Bakeries Ltd.*, [1950] 2 W.W.R. 735 (Alta. S.C.) (hereafter "*McGavin Bakeries*") (open trade association and market allocation); *R. v. Dominion Rubber* (1953), 107 C.C.C. 256 (Ont. S.C.), *R. v. Lyons Fuel Hardware & Supplies Ltd.* (1961), 30 D.L.R. (2d) 6 (Ont. H.C.) (hereafter "*Lyons Fuel*") (identical prices or bidding); *R. v. Famous Players* (1932), 58 C.C.C. 50 (Ont. S.C.) (wide disclosure of rules to numerous customers).

With respect to identical pricing or bids, we readily acknowledge that identical bids do not conclusively, nor even presumptively, suggest a conspiracy, but they do suggest that further inquiry is merited in most instances. See further Green, note 10, *supra*, at 267: "It seems doubtful, however, that if the tenders are by sealed bid, they would, in the absence of agreement, be identical, although admittedly the possibility of uniformity is increased when there are only three or four firms, a homogeneous product, a rule of thumb markup pricing formula is used, and the tenders are made to government bodies which make the winning bid public."; Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1968* (Ottawa: Ministry of Supply and Services, 1968) at 43-6; Commissioner, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1952* (Ottawa: Ministry of Supply and Services, 1952) at 25.

On the basis of such data, we would suggest that the Crown's threshold for commencing actions against conspirators has been very high¹³ and most prosecutions have "cried out" for action.¹⁴

(c) *Success Rate*

A success rate of 75% might suggest that there is no pressing need to amend the law. Nevertheless, we believe that the calculation highly inflates the Crown's real success rate for at least two reasons:

- First, many of the Crown's "wins" were achieved through prohibition orders or guilty pleas with modest fines, rather than contested cases in which the Crown secured a conviction.
- Second, we believe that many of the cases resolved through prohibition orders or guilty pleas would have been lost, if litigated, and were settled on purely economic grounds.¹⁵

¹³ Stanbury, note 9, *supra*, at 74: "[T]he Crown [may be] failing to test the limits of the law by bringing cases that require more imaginative approaches."; Green, note 10, *supra*, at 262: "Most price-fixing cases that have come before the courts involve all or almost all of the important firms in the industry." Consider further Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1972* (Ottawa: Ministry of Supply and Services, 1972) at 24 ("Dry Cell Batteries"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1973* (Ottawa: Ministry of Supply and Services, 1973) at 40 ("Gasoline - Oshawa"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1974* (Ottawa: Ministry of Supply and Services, 1974) at 29 ("Gasoline - Montreal"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1970* (Ottawa: Ministry of Supply and Services, 1970) at 35 ("Report in the Matter of an Inquiry Relating to the Distribution and Sale of Gasoline and Related Products in the Sudbury Area"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1969* (Ottawa: Ministry of Supply and Services, 1969) at 40 ("Bread - Ontario"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1968* (Ottawa: Ministry of Supply and Services, 1968) at 42 ("Household Furnishings, Toronto"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1967* (Ottawa: Ministry of Supply and Services, 1967) at 33 ("Propane - British Columbia"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1966* (Ottawa: Ministry of Supply and Services, 1966) at 34 ("Alleged Combination - M.C.P., 2, 4-D and 2, 4, 5-T"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1965* (Ottawa: Ministry of Supply and Services, 1965) at 40 ("Bread - Alleged Agreement to Increase Prices"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1953* (Ottawa: Ministry of Supply and Services, 1953) at 25 ("Municipal and Other Tenders"). To be fair, the Crown has not received much support from the judiciary when it has prosecuted "tough" cases: see, for example, *R. v. Bayda and Associates Surveys Inc.* (1997), 78 C.P.R. (3d) 203 (Alta. Q.B.) (hereafter "*Bayda*").

¹⁴ Green, note 10, *supra*, at 248: "In the seven decades following the initial enactment in 1889, the only significant application of anticommon law was against a few long-lived price-fixing and / or market-sharing agreements, the members of which admitted to conspiratorial activity although they denied that they had either intended or done harm by their actions."

¹⁵ Until recently, fines imposed on conspirators have been very modest and arguably have operated as mere "licencing fees." The average fine for conspiracy and bid-rigging cases during the period of 1965 to 1991 was \$45,000 and, even in the period of 1985-1991, the average fine was only \$125,000. The largest fine ever imposed on a Canadian conspirator up to 1990 was \$400,000. Stanbury, note 9, *supra*, at 70-73 and 136. As a stark example, in 1990 the Competition Bureau announced a record fine of \$3.4 million (in the aggregate) for a bid rigging scheme in the flour industry that lasted 12 years and involved more than \$500 million worth of business. It is hard to believe that such a long-lasting scheme concerning such a significant amount of commerce did not reap rewards far in excess of the penalty. As a common rule of thumb, conspirators are often assumed to have maintained prices higher than would have prevailed in the absence of the conspiracy by 10% to 20% (see OECD, *Hard Core Cartels* (Paris: Centre français d'exploitation de droit de copie, 2000) at 12 and n. 2 (hereafter "*OECD Report*")), which would have bestowed upon the flour conspirators \$50 to \$100 million in unjust profits. As stated by Wetston: "We know that the crime of robbery would not be adequately deterred if convicted persons merely faced the prospect of having to return their stolen property to society." H.I. Wetston, "Canadian Competition Law: Current Issues in Conspiracy Law and Enforcement" (Meredith Memorial Lectures, McGill University, Montreal, November 30, 1990) 33 at 46, cited in P.S. Crampton and J.T. Kissack, "Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities"

In order to draw some clearer conclusions about the enforcement record in Canada, we conducted our own examination of litigated section 45 cases.¹⁶

Our Study found that:

- of the 53 litigated¹⁷ cases, the Crown has won only 26 of them and its record since 1975 has been a dismal 4 of 22 cases (20%);
- of the 27 litigated cases that the Crown has lost, Crown counsel was able to demonstrate a conspiracy in almost half (12) of those cases, but nevertheless could not demonstrate that the conspiracy had an undue impact on competition or, in one case, that the accused intended objectively to unduly lessen competition;¹⁸
- since 1975, of the 7 litigated cases that did not involve a monopoly or "virtual monopoly,"¹⁹ the Crown lost every case.²⁰

Accordingly, we believe that the real success rate of the Crown has been low.

(d) *Conclusions*

The Canadian record in the enforcement of conspiracies is not impressive. The total number of cases in which the Crown has advanced proceedings does not significantly exceed the number of years in which the law of conspiracy has been available for prosecution. The total number of cases in which the Crown has successfully litigated a conspiracy case is less than 30. Of those successful cases, the vast majority of them have involved monopoly or "virtual monopoly" aggregate market share levels. We suspect that Stanbury's conclusion that "[t]he conspiracy provisions of the

(1993), 38 McGill L.J. 569 (hereafter "*Crampton & Kissack*"). See also *Goodyear Tire and Rubber Co. of Canada v. The Queen* (1956), 2 D.L.R. (2d) 11 at 13 (S.C.C.). Moreover, prior to 1990, the threat of additional penalties being imposed through private actions was very low. When the cost of litigating the case is considered, including the costs imposed upon the corporation through negative publicity and lost executive time, it is no wonder that most of the accused agree to plead guilty. Note that an individual can receive a jail sentence for a section 45 conviction, but it is our understanding that such a sentence has been imposed in less than a handful of cases and at least two of those cases involved service of the jail sentence "in the community."

¹⁶ Our study consisted of all litigated conspiracy cases reported in G.N. Addy and W.L. VanVeen, *Competition Law Service* (Aurora, Ont.: Canada Law Book, 2001), Davies, Ward & Beck, *Competition Law of Canada* (New York: Juris Publishing, 2000) (hereafter, "*Competition Law of Canada*") and Chandler & Jackson, note 9, *supra*.

¹⁷ For the reasons mentioned in this Part, we believe that the inclusion of non-litigated cases in the Study would bias the results of our analysis. We acknowledge that an accused would not readily admit to a conspiracy that did not exist, but believe that there is good reason to doubt that the Crown would have succeeded in obtaining a conviction in many of those cases involving plea bargains and other settlements. We doubt, in particular, that the Crown would have been able to demonstrate an undue impact on competition in many of those cases.

¹⁸ Stanbury, note 9, *supra*, at 64, points out that from 1910 to 1960 conspiracies could be prosecuted under the *Criminal Code* where the "unduly" test was employed or under the *Combines Investigation Act* where the "public detriment" test was employed. The courts often treated these two tests as being synonymous.

¹⁹ Our study has placed in this category all cases involving market shares of 90% or more, as well as those in which the court indicated that the participants in the alleged conspiracy had a "virtual monopoly."

²⁰ Only post-1975 cases in relation to which we were able to identify the participants' market share(s) were included.

Competition Act and its predecessors have been a *failure* in terms of protecting the public interest ...²¹ has more than a grain of truth.

2. The Economic Perspective

(a) General

Economists almost universally agree that "hard core" conspiracies contribute little net benefit to society.²² Some conspiracies do not materially harm our economy, however, because the parties lack the requisite market power to impact on competition. As stated by Hovenkamp:

If a town contains ten similar grocers, and three of them jointly run a newspaper advertisement quoting retail prices, the arrangement would reduce advertising costs for each of the three. Furthermore, three grocers out of ten could not plausibly fix prices. Customers would buy from the other 7 ²³

²¹ Stanbury, note 9, *supra*, at 109-10. We note that the public record (e.g., the Parliamentary, legislative and administrative record) does not reflect the *will* of the Canadian government to seriously prosecute price-fixing, particularly in the first half of the 20th century. See P.K. Gorecki and W.T. Stanbury, "Chapter 2 - The Administration and Enforcement of Competition Policy in Canada, 1889 to 1952" in R.S. Khemani & W.T. Stanbury, eds., *Historical Perspectives on Canadian Competition Policy* (Halifax: Institute for Research on Public Policy, 1991) at 114-16 and 119-21 (at 119: "... Canadians have been extremely reluctant to do more than rhetorically condemn a wide variety of restraints of trade."); T.D. MacDonald, "Canadian Anti-Combines Legislation," U.T. Fac. L. Rev., Vol. 13, Spring 4 at 12, referring to *The Dominion Trade and Industry Commissioner Act, 1935*, which was designed to protect those who would otherwise engage in "wasteful or demoralizing" competition; *Beckett*, note 12, *supra*, at 427-28: "However reluctantly, I [Crown counsel] am compelled to ask that these arrangements be broken up ..."; (the Court speaking): "Prior to the formation of any association of wholesale grocers ... [they] were making a very small profit altogether, and not even a living profit on staples."; Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1956* (Ottawa: Ministry of Supply and Services, 1956) at 35: "[T]he trial judge ... imposed fines of \$1 each"; Registrar, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1926* (Ottawa: Ministry of Supply and Services, 1926) at 11: "Moreover, it seemed clear that the minimum selling prices aimed at were not unreasonable, all costs considered." Part of the historical reluctance to seriously prosecute conspiracies can be explained by the pervasive view that "bigger might be better" in Canada. See "Competition Policy in Canada: Past and Future" (Backgrounder for Canadian Competition Policy - Preparing for the Future, 2001), found at www.ivey.ca/competitionconference2001/proceedings2/ConfSpeech_eng.htm (accessed on July 12, 2001) at 2: "The framers of the original competition legislation in 1889 did not object to power as such, but rather to its abuse. They believed that Canada as a whole would benefit from large aggregations of capital (such was the means to a higher standard of living for the nation), but recognized that with size came responsibility: consumers, workers and competitors must not be exploited."; E. Clark, President and COO, TD Bank Financial Group, "The Dynamic between Domestic Competition and International Competitiveness" (Backgrounder for Canadian Competition Policy - Preparing for the Future, 2001), found at www.ivey.ca/competitionconference2001/proceedings2/ConfSpeech_eng.htm (accessed on July 12, 2001) at 2-3; A.M. Rugman, "The Impact of Globalisation on Canadian Competition Policy" (Backgrounder for Canadian Competition Policy - Preparing for the Future, 2001), found at www.ivey.ca/competitionconference2001/proceedings2/ConfSpeech_eng.htm (accessed July 12, 2001) at 9. Hence, Green, note 10, *supra*, might be correct at 298 when he posits that: "One imagines that the word 'unduly' was thrust into the 1889 legislation just because the protectionist spirit made 'too much' competition suspect. Combinations were acceptable so long as they did not become a total bar to competition. This mentality has not disappeared."

²² See *OECD Report*, note 15, *supra*. See also M.J. Trebilcock, et al., *The Law and Economics of Canadian Competition Policy* [to be published], Chap. 3 at 1; Warner & Trebilcock, note 2, *supra*, at 683-84; Competition Bureau, "Competition Policy Considerations in GATS Negotiations" [draft], found at www.strategis.gc.ca/SSI/ct/gats.pdf (accessed Aug. 6, 2001) at 7 (hereafter "GATS").

²³ H. Hovenkamp, *Federal Antitrust Policy*, 2d ed. (St. Paul, Minn.: WestGroup, 1999) at 193 (hereafter "Hovenkamp"). See also E.T. Sullivan and J.L. Harrison, *Understanding Antitrust and its Economic Implications* (New York: Matthew Bender, 1988) at 86.

One policy debate therefore revolves around the need, and indeed desire, of prohibiting and prosecuting conspiracies that do not materially impact on competition because the conspiring parties do not have market power.

(b) *Benefits of Impact Analysis*

Obviously, the principal benefit associated with a *rule of reason* or *undue* competition impact analysis is the increased likelihood that costs associated with prosecuting cases that do not pose any harm to society ("*Gray Costs*") will be avoided.²⁴ We believe that such costs would be relatively small because:

- It can generally be assumed that "hard core" conspiracies will not be proposed by businessmen and women who do not believe that they will be effective, although that is no certainty that they will be effective;²⁵ and
- We would expect the Crown to exercise prosecutorial discretion to settle many of the cases where a conspiracy clearly had no effect on the economy by offering inducements, such as an agreement to recommend a discharge, conditional discharge, prohibition order or small fine.²⁶

We further believe that the Gray Costs are significantly exceeded by the costs associated with maintaining our present *undue* standard ("*Present Costs*").²⁷

²⁴ R.A. Posner, *Antitrust* (St. Paul, Minn.: West Publishing, 1974) at 128-29: "[W]hile it is doubtless true that firms would not enter into price-fixing conspiracies if they were convinced they would not succeed, they may sometimes be mistaken, and such mistakes, even if rare, could account for a large proportion of the small number of price-fixing cases that the enforcement agencies bring."

²⁵ See Posner, *ibid.*; Hovenkamp, note 23, *supra*, at 214, citing *American Column & Lumber Co. v. U.S.* (1921), 257 U.S. 377; *Brook Group v. Brown & Williamson Tobacco* (1993), 113 S. Ct. 2578 at 2605, per Stevens J., dissenting: "the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would be an outsider who might not know the difference between Haydn and Mozart." In some cases, Canadian conspirators have been prosecuted before they achieved sufficient agreement within the relevant industry to exercise joint market power. Such cases do not stand for the proposition, however, that the conspirators intended to implement an agreement that had little chance of success.

²⁶ The Commissioner (and his predecessors) also exercises considerable discretion in determining those cases that are referred to the Attorney General for prosecution. See Director of Investigation and Research, Bureau of Competition Policy, *Annual Report for the Period Ending March 31, 1990* (Ottawa: Minister of Supply and Services Canada, 1990) at 67 ("Geraldton Hairdressers": resolved by public retraction of joint advertisement); Commissioner of Competition, Competition Bureau, *Annual Report for the Period Ending March 31, 1999* (Ottawa: Minister of Supply and Services Canada, 1999) at 24 ("Regional Building Contracts: Bid-rigging": resolved by undertaking of firms not to engage in activities again); Director of Investigation and Research, Bureau of Competition Policy, *Annual Report for the Period Ending March 31, 1998* (Ottawa: Minister of Supply and Services Canada, 1998) at 9 and Table 3 ("Conspiracy ": resolved by negotiations leading to termination of agreements; "Dry Cleaning Services": resolved by undertakings; "Septic Tanks": resolved by undertakings; "Taxis": resolved by undertakings); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1958* (Ottawa: Ministry of Supply and Services, 1958) at 26 ("Sand and Gravel": resolved by negotiations leading to termination of agreements); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1978* (Ottawa: Ministry of Supply and Services, 1978) at 50 ("Taxi Cab Services - Chatham, New Brunswick": application for a prohibition order); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1953* (Ottawa: Ministry of Supply and Services, 1953) at 19 ("Winnipeg Bread Report"). See also J.A. VanDuzer and G. Paquet, "Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice" (Oct. 1999), found at <http://strategies.ic.gc.ca/pics/ct/vdreport.pdf> (accessed on Aug. 21, 2001), Part III at 7 ("Case Selection Criteria").

²⁷ Some might argue that a further benefit of an impact analysis is the protection of certain efficiency generating conspiracies. Nevertheless, our focus in this part is on "hard core" cartels, rather than conspiracies that offer potential for economic benefits. See Kennish & Ross, note 2, *supra*, at 24, who argue that Canadian

(c) *Costs of Impact Analysis*

Some of the Present Costs include:

- The cost to Canadian society of an increased number of conspiracies that harm our economy, which would likely be higher in number than under a *per se* standard because of the:
 - increased uncertainty of the law, which would likely lead some to consummate such conspiracies that otherwise would not;²⁸
 - likely increase in the failure of the Crown to prosecute such conspiracies because they are considered "difficult" cases;²⁹
 - likely increase in the failure of the Crown to prove, or the courts to accept, that the conspiracy would *unduly* lessen or prevent competition *beyond a reasonable doubt*;³⁰
- "Transactional" costs, such as:
 - the increased cost of advising businesses on the law of conspiracy in Canada, given its complexity and uncertainty;³¹

conspiracy law is too restrictive at present and "does not properly take account of the almost endless possibilities for economically efficient co-operation among firms that may happen to be competitors." Yet, Kennish & Ross do not argue that "garden-variety price fixing, bid-rigging and market allocation schemes" ought to be defended on this basis. *Ibid.* at 27. See also F.M. Scherer, "Industrial Market Structure and Economic Performance" in T.W. Dunfee and F.F. Gibson, *Antitrust and Trade Regulation* (Toronto: John Wiley & Sons, 1980) at 56-8 (hereafter "Scherer"): "... if pooling indivisible resources or cooperating in research and development is genuinely advantageous, it is usually worth doing without the additional encumbrance of price-fixing or market-sharing agreements. The need for cartelized cooperation is especially small in a market as vast as the United States, where the conflict between scale economies and competition is seldom acute."; R.H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978) at 263 (hereafter "Bork"): "The efficiencies arising from a naked price-fixing or market-division agreement, if any ever do arise, must be so minor that the law is justified in ignoring them." Note that the Supreme Court of Canada was clear in *PANS* that our present undue inquiry "does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason [approach] would." *PANS*, note 12, *supra*, at 650.

²⁸ Stanbury, note 9, *supra*, at 96: "Where the accused have taken an economic approach they take into account such variables as the probability of being caught, convicted and penalized; the likely increase in profits attributable to an agreement with competitors; and the likely lag between the time the benefits are received and the costs are incurred."; Bork, note 27, *supra*, at 263: "The subject of cartels lies at the center of antitrust policy. The law's oldest and, properly qualified, most valuable rule [in the U.S.] states it is illegal *per se* for competitors to agree to limit rivalry among themselves. We have already discussed ... the great cases that established and elaborated this doctrine ... There are, of course, hundreds of other cases in which the doctrine of *per se* illegality for eliminations of rivalry (e.g., price fixing and market division) has been applied, and without doubt thousands have never been broached because of the overhanging threat of this rule. Its contributions to consumer welfare over the decades have been enormous." See also M.K. Block, *et al.*, "The Deterrent Effect of Antitrust Enforcement" (1981), 89:3 J. Pol. Econ. 429; R.M. Feinberg, "Antitrust Enforcement and Subsequent Price Behaviour" (1980), 62 The Rev. of Econ. and Stat. 609; R.D. Blair and D.L. Kaserman, *Antitrust Economics* (Homewood, Illinois: Richard D. Irwin, 1985) at 157-60; G.J. Stigler, "The Economic Effects of the Antitrust Laws" (1966), 9 The Journal of Law and Econ. 225 (hereafter "Stigler").

²⁹ See Part B.1(b).

³⁰ *PANS*, note 12, *supra*, is an instructive example, where the Crown proved that the agreement would lessen competition unduly beyond a reasonable doubt, but could not prove that a reasonable business person ought to have known that such an impact would occur beyond a reasonable doubt.

- the increased likelihood that such advice will not correspond with international antitrust standards, such as those in the United States and Europe, and the associated cost of restructuring relationships to adhere to such international standards;³² and
- The additional cost of litigating conspiracy cases because of the increased complexity of the adjudication process.³³

Naturally, these costs are difficult to quantify, but we believe that they would exceed the Gray Costs referred to in Part B.2(b).³⁴

³¹ Scherer, note 27, *supra*, at 56-8: "A relatively unimportant cost [using a rule of reason standard] would be the increased uncertainty business firms would face as to which agreements are illegal. At least in borderline areas, it would be impossible to proceed with confidence until the enforcement agencies or judiciary has rendered an opinion. This is not a serious problem, however, for companies could always avoid legal uncertainty by refraining from brinkmanship. In so doing, they would be no worse off than under a *per se* rule prohibiting all clear-cut restrictions." In our experience, however, these costs are not insignificant. There is no doubt that Canadian businesses have incurred significant expenditures for legal advice directly attributable to the uncertainty of our conspiracy law. They have suffered from the inability of counsel to give them clear directions on the treatment under our *Competition Act* of joint ventures, strategic alliances, ancillary restraints and other matters, as well as the cost of retaining counsel to draft and review such agreements so as to ensure that their pro-competitive intentions will be made manifest and obvious to a reader. While some speculated that the decision in *PANS*, note 12, *supra*, helped to clarify the law, we do not share this view. Indeed, it could be argued that Gonthier, J. actually muddled the waters in suggesting that "A particularly injurious behaviour may also trigger liability even if market power is not so considerable" and "[p]arties to the agreement need not have the capacity to influence the market[, but rather w]hat is more relevant is the capacity to behave independently of the market, in a passive way." (*PANS*, note 12, *supra*, at 657 and 654.) We would suggest that those words will be made great use of in the coming years and continue the trend toward more prolonged and complicated court proceedings. In fact, *R. v. Clarke Transport Canada Inc.* (1995), 130 D.L.R. (4th) 500 (hereafter "*Clarke Transport*") is evidence of such trend. In the past, opinions as to the appropriate level of market share that will be condemned as undue ranged anywhere from 35% to 90%. We tend to think that both ends of the spectrum could be defended on a rational basis, depending on the circumstances, including the judge that hears the case. See Green, note 10, *supra*, at 260: "... the agreeing sellers must account for at least 80 to 90 percent of industry output in the relevant market."; B. Dunlop, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 131: "[I]t is difficult to disagree with the conclusion ... that ... a market share of at least 80% is required [to unduly lessen competition]"; Crampton & Kissack, note 15, *supra*, at 571: "[I]t would be imprudent to follow the old rule of thumb that an agreement would not likely contravene section 45 if the parties thereto account for less than fifty per cent of the relevant market. A better market share rule of thumb would be the thirty-five per cent standard."

³² Canada's conspiracy law enables our business community to adopt structures and arrangements that are not permitted outside our borders, which may have the impact of stifling economic expansion because of the cost of reshaping such structures and agreements to suit foreign laws. See International Antitrust Draft Code Working Group, "Draft International Antitrust Draft Code as a GATT-MTO-Plurilateral Trade Agreement," 65 Anti. & Trad. Reg. Rep. at S-3 (hereafter "*International Draft Code Group*"): "In the globalized economy the law of many nations applies to the same transaction and the law of each nation has somewhat different requirements and standards. The disharmonies are sand in the gears of smooth and efficient market transactions. They increase the costs of business and deter some salutary transactions."

³³ See Scherer, note 27, *supra*, at 56-8: "If the expanded rule of reason approach required to implement this policy were itself costless, it should be adopted. But it is not costless. There are definite costs in the form of added uncertainty, more complex adjudication, and an enhanced probability of irrational and erroneous choices. ... A thorough investigation of this sort conducted under traditional antitrust procedures would be so costly in terms of money and, more important, high-level talent that the enforcement agencies would find the number of cases they could initiate sharply limited."; Hovenkamp, note 23, *supra*, at 193; Green, note 10, *supra*, at 262. Note that the number of days of trial in a conspiracy case can be enormous: In *Beckett* (1910), note 12, *supra*, *Container Materials* (1942), note 12, *supra*, and *R. v. Ash-Temple Company Limited*, [1949] O.R. 315 (Ont. C.A.), the trial days were 8, 25 and 55, respectively; in *McGavin Bakeries* (1951), note 12, *supra*, *Howard Smith Paper Mills, Ltd. v. The Queen* (1957), 8 D.L.R. (2d) 449 (S.C.C.), affirming [1955] 4 D.L.R. 225 (Ont. C.A.), affirming [1954] 4 D.L.R. 161 (Ont. Ct. Just.), *R. v. Canada Packers Inc.* (1988), 19 C.P.R. (3d) 133 (Alta. Q.B.) (hereafter "*Canada Packers*") and *Clarke Transport*, note 31, *supra*, the trial days were over 6 months, 95 days, 1.5 years and 40 days, respectively. In the latter case, the Crown was criticized for not presenting more evidence with regard to the relevant market.

(d) Conclusions

Accordingly, we believe that the Canada's law of conspiracy ought to be reformed by making *per se* illegal³⁵ "hard core" cartels.³⁶ We believe that the legislative model ought to capture those types of conspiracies that offer little chance of offsetting efficiency benefits, while "releasing" from the net those cooperative agreements and arrangements that have potential for efficiency generating or other benefits. We further believe that "hard core" cartels should not be treated using a *rule of reason*,³⁷ shifted burden impact analysis³⁸ or any other sort of system requiring an economic

³⁴ See also note 197, *infra*.

³⁵ We note that the concept of *per se* illegality in the Canadian competition law context is nothing new. For example, the *Competition Act* makes it *per se* illegal to set prices in response to a bid tender (s. 47), to agree (as between or among financial institutions) on interest rates and certain other things (s. 49) and to discriminate in pricing in certain instances (s. 50(1)(a)). A somewhat harsh *per se* provision is section 61, which makes it an offence for any person to attempt to influence the price charged by any other person, which could have vertical and horizontal application. See Part C.1(a)(1)(ii).

³⁶ OECD Report, note 15, *supra*, at 6: "Hard Core" cartels are anticompetitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets." See also Hovenkamp, note 23, *supra*, at 83 and 88-9, who describes the classic "hard core" cartels as follows:

The simplest cartel is an agreement among perfect competitors to sell all their output at the same, agreed upon price. ... [S]ome industries may be more conducive to output restriction agreements, in which the members decide how much each should produce and sell, but the market itself determines the price. ... An alternative to the output reduction agreement is the agreement on market share, with penalties for firms that exceed their assigned shares. ... Such an agreement can be far more flexible than a strict output reduction agreement, because it enables the parties to deal with sudden changes in demand for the product without consulting each other (which can be dangerous!). ... Horizontal territorial division can be an effective method of cartilization, although it works in relatively few markets. ... One problem with such territorial division, however, is that outsiders can often see what is happening.

In the United States, "The Department of Justice prosecutes participants in hard-core cartel agreements criminally" and the "[t]ypes of agreements that have been held *per se* illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce." While the concept of a "hard core cartel" is not defined with vivid lines, it appears to rest on whether or not the parties can point to an "efficiency-enhancing integration of economic activity" for which the challenged agreement is "reasonably related" and "reasonably necessary to achieve its procompetitive benefits"; if not, and if the challenged conduct is of a type otherwise subject to traditional *per se* standards, it is deemed a "naked" restraint subject to criminal prosecution. U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* (April, 2000), found at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> at §3.2 (hereafter "U.S. Competitor Collaboration Guidelines").

³⁷ Under a *rule of reason* analysis, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." W.C. Holmes, *Antitrust Law Handbook*, 1999 ed. (St. Paul: West Group, 1999) at 304-05 (hereafter "Holmes"), citing *State Oil Co. v. Khan* (1997), 522 U.S. 3 at ¶16, citing *Board of Trade of Chicago v. U.S.* (1918), 246 U.S. 231 at 238. See further PANS, note 12, *supra*, at 650. Holmes points out that "[t]he distinction between practices deemed *per se* illegal, and those that are instead to be judged by the rule of reason or by some intermediate standard, is anything but immutable. These have not been easy categories for the courts to define, let alone to apply. As a result, practices that have at one time been analyzed under one test have later been brought under an altogether different standard." *Ibid.*, at 305-06.

³⁸ Scherer, note 27, *supra*, at 58-9: "A second proposal is credited to Professor S. Chesterfield Oppenheim. He has suggested that instead of holding price-fixing agreements *per se* illegal, they be considered *prima facie* illegal. In order to escape censure, price fixers would then bear the burden of proving that their agreements do not constitute an unreasonable restraint of trade. This approach has the merit of forcing the parties with the closest knowledge of internal industry workings to carry forward most of the positive economic analysis. If there is information that might vindicate their conduct, the members of an industry are in a position to supply it. Conversely, it is much more difficult for a government enforcement agency to obtain evidence needed to prove an agreement's unreasonableness. Yet despite its advantages from an enforcement standpoint, a *prima*

analysis because we are of the view that many of the costs identified in Part B.2(c) would not be avoided using any such standard.

C. PROPOSED LEGISLATIVE CHANGES

1. An Overview of the Draft Code

In designing a legislative model for evaluating and prohibiting "hard core" conspiracies, we have been cognizant of the need to avoid:

- (1) excessive *uncertainty* as to whether or not business conduct falls within the category of "hard core" conspiracies;
- (2) excessive *costs of litigation* in relation to business conduct that is accepted as falling within the category of "hard core" conspiracies;
- (3) social costs resulting from the reluctance of businessmen and women to engage in socially desirable conduct because of the *rigidity* of the law and its criminal lenses; and
- (4) a *stagnant system* that is incapable of evolution to meet developments in legal and economic thinking about how various types of business conduct ought to be viewed.

Thus, the Draft Code has four main components:

- (1) A *per se* net capturing only a limited category of agreements and arrangements having the object or effect of affecting prices, output, expansion, entry, customers or suppliers in respect of a market;
- (2) A broader civil net enabling the Commissioner to take action against all agreements or arrangements having the effect of substantially affecting competition, regardless of whether or not such agreement or arrangement falls within the *per se* net;
- (3) An automatic release from the *per se* net of certain types of agreements and arrangements arising from transactions that are not aimed at harming competition and could not be reasonably foreseen to harm competition; and
- (4) A clearance mechanism enabling the Commissioner to develop block exemptions reflecting current economic and legal thinking with regard to conspiracies and other forms of business conduct and to release from the *per se* net specific agreements and arrangements that have been notified and found to be, on balance, socially desirable.

The Draft Code is fully set forth in Appendix 2 hereto and is described in detail in the following Parts of this report.

facie rule does not solve the problem of continuing surveillance, nor does it overcome the judiciary's inability to deal analytically with the evidence, once it has been assembled."

(a) *The Per Se Net*

45. (1) Every one who enters into an agreement or arrangement with one or more other persons for the purpose or having the effect of:

- (a) fixing, stabilizing or otherwise affecting prices in or of a market,
- (b) eliminating or restricting capacity, output or supply in, of or to a market,
- (c) impeding expansion or entry in, of or into a market, or
- (d) allocating, ceasing to supply or purchase, or otherwise affecting relations of either or any of them with one or more of any of their customers in, or suppliers to, a market,

where those persons or their affiliates, or two or more of them, compete in the market, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding [x] or to both.

(1) *Scope of Coverage*(i) *"Agreements" and "Arrangements"*

The Draft Code would only capture "agreements" and "arrangements." The *Competition Act* currently captures all "agreements," "arrangements," "conspiracies" and "combines" that have the requisite impact on competition. It is almost universally accepted that the essential element of all conspiracies falling within section 45 of the *Competition Act* is an "agreement."³⁹ Nevertheless, some courts have given added meaning to the words "combine" and "arrange"⁴⁰ and other courts have threatened to read "agreement" as meaning only those conforming to the principles of contract law.⁴¹

Were the words 'arrange,' 'combine' and 'conspire' to be removed from the statute, two things might arise:

- First, the courts might interpret the removal of those words as an intention to limit the application of the provision to only agreements formed pursuant to contract law; and

³⁹ *Papalia and Her Majesty the Queen*, [1979] 2 S.C.R. 256 at 276, per Dickson, J.: "The word 'conspire' derives from two Latin words, 'con' and 'spirare,' meaning 'to breathe together.' To conspire is to agree. The essence of criminal conspiracy is proof of agreement." Thus, mere invitations to collude would not be captured by subsection 45(1) of the *Competition Act*. See *U.S. v. American Airlines, Inc.* (1984), 743 F.2d 1114, *cert. denied* (1985), 474 U.S. 1001; *In Re: Potash Antitrust Litigation*, [2000-1] Trade Cas. ¶ 72,812 (8th Cir.), *cert. denied* 2000 U.S. Lexis 4929 (hereafter "*Potash*").

⁴⁰ For example, in *Electrical Contractors*, note 12, *supra*, at 276, Laidlaw, J.A., of the Appellate Division of the Supreme Court of Ontario, stated:

The scope of the section is not confined to conspiracy. It extends to and includes the wrong committed by a person who 'combines,' 'agrees' or 'arranges' with another person. Two or more persons may wrongfully combine by joining together their acts and activities to accomplish a result or by co-operating one with the other for the desired end. Each of them may take steps to put matters in such order as will lead to a common objective and thus arrange it. Without attempting to define the scope of the class of persons falling within the section it would appear to me sufficient to say that it is not limited to persons who agree one with the other but it includes also persons who combine or arrange to do what is prohibited by the section.

⁴¹ See, for example, *Atlantic Sugar Refineries Co. Ltd. v. A.G. for Canada*, [1980] 2 S.C.R. 644 at 657, where Pigeon, J., speaking for the majority, suggested that the necessary 'agreement' in section 45 depended upon the law of contract. Estey, J., in dissent, commented that: "The four words [conspires, combines, agrees or arranges] describe 'agreement' in the broadest sense accorded to that word in the language and not the narrow term of art from a specialized branch of the law."

- Second, certain types of arrangements that do not involve direct communication between competitors might escape the reach of the law, even though a meeting of the minds could be inferred from the conduct.⁴²
- Accordingly, we are of the view that the word "arrange" is necessary to ensure that section 45 is not restricted in application to only agreements formed pursuant to contract law. On the other hand, we feel that the words 'combine' and 'conspire' add little interpretive value to the provision based on existing case law and, indeed, some argument could be made that the use of the word 'combine' in section 45 confuses the meaning of the word 'combination' in Part IX of the *Competition Act*.⁴³

(ii) "Purpose" or "Effect"

The Draft Code would render *per se* illegal all those agreements or arrangements having the purpose or effect of fixing prices or otherwise harming competition in any of the prescribed ways. As such, the scope of our legislative model would be somewhat broader than existing law, which would not make criminal those poorly designed agreements that, while intended to unduly impact on competition, failed to do so.⁴⁴ The bases for our position that agreements or arrangements entered into for the purpose of harming competition ought to be illegal are as follows:

- First, the approach would tend to encourage those accused of conspiracy to introduce evidence as to their intent in relation to challenged agreements or arrangements, which is appropriate given that they are in the best position to proffer such evidence;
- Second, capturing agreements and arrangements that have been entered into for the purpose of harming competition would, in essence, merely make criminal certain attempts to harm competition and, while it is possible to pursue such matters under the *Criminal Code*,⁴⁵ there can be difficulties with such prosecutions⁴⁶ and they are rarely undertaken;⁴⁷

⁴² See, for example, *Interstate Circuit v. U.S.* (1939), 306 U.S. 208; *U.S. v. Airline Tariff Publishing Company* (1993), 836 F.Supp. 9 (Dist. Ct., Col.). Pursuant to Article 81(1) of the *Treaty of Rome*, certain "decisions by associations of undertakings" that impact on competition are prohibited. The wording ensures, *inter alia*, that decisions made by, or arrangements effected through, trade associations are captured.

⁴³ A.C. Gourley and J.A. VanDuzer, *Merger Notification in Canada* (Toronto: CCH Canada Limited, 1996) at ¶ 3270, *et seq.* (hereafter "*Gourley & VanDuzer*"). We found some support for our position in subsections 5(1), 6(1), 47(1) and 49(1) of the *Competition Act*, which also refers to "agreements or arrangements," as well as Bill C-256, which would have used the phrase "agreement or arrangement." Bill C-256, s. 2(1) ("joint venture"). See also *Competition Act*, s. 114(1)(a). Clearly, the draftpersons of these provisions also felt that "arrangement" added something that otherwise might be lost in interpretation. Perhaps of most interest are subsections 48(2) and (3), which refer to "agreements" or "arrangements" mentioned in subsection (1), which, in turn, refers to "conspir[acies], combin[ations], agree[ments] or arrange[ments]."

⁴⁴ See, for example, *Clarke Transport*, note 31, *supra*. Under the *Treaty of Rome*, it has been held that the "object" of the agreement "is to be found by an objective assessment of the aims of the agreement in question, and it is unnecessary to investigate the parties' subjective intentions." V. Rose, ed., *Bellamy & Child: Common Market Law of Competition*, 4th ed. (London: Sweet & Maxwell, 1993) at 90-91 (hereafter "*Bellamy & Child*"). Subsequent to *PANS*, note 12, *supra*, we would expect Canadian courts to look to the wording of the agreement, along with other indicia, as objective evidence of the subjective intent of the parties, but would not anticipate the courts avoiding the exercise of determining such intent altogether. An interesting case would be one in which the clear intention of one of the parties to the agreement was to harm competition, while the clear intention of all other parties was completely different.

⁴⁵ *Criminal Code*, R.S.C. 1985, c. C-46, s. 24 (hereafter "*Criminal Code*").

⁴⁶ See *R. v. Dungey* (1979), 51 C.C.C. (2d) 86 (Ont. C.A.), where the Court stated that "[t]o hold that there is an offence of attempting to conspire to defraud is tantamount to convicting a person of an attempt to attempt to defraud."; *R. v. Cluett, Peabody, Canada Inc.* (1982), 64 C.P.R. (2d) 30 (Ont. Crim. Ct.) where it was held that there was no such offence as attempting to maintain resale prices, since the offence of resale price maintenance is already an "attempt" offence; *R. v. Canadian Oxygen Ltd.* (1975), 24 C.P.R. (2d) 258 (Que.

- Third, the pursuit of agreements and arrangements designed to impact on competition would not be novel, given the ability to prosecute *predatory conduct intended to harm competition* under paragraphs 50(1)(b) and (c),⁴⁸ *attempts to influence pricing* under subsection 61(1), *attempts to induce refusal of supply* under subsection 61(6) and *attempts to impede* under subsection 64(1); and
- Finally, one of the fundamental goals of the Draft Code to discourage the design of agreements and arrangements that are intended to affect competition in one of the prescribed manners, irrespective of whether or not the agreement or arrangement is faulty in fact.

While judicial opinion is divided as to whether or not anticompetitive intent alone is sufficient to render unlawful an agreement under §1 of the *Sherman Act*,⁴⁹ our approach would be consistent with European law, which captures those agreements and arrangements "which have as their *object or effect* the prevention, restriction or distortion of competition"⁵⁰

There are those who may criticize the Draft Code as being overly broad in capturing *all agreements and arrangements between or among competitors that may have an effect on prices, output, expansion or customer / supplier relations*: "For example, isolated Farmer Brown, who does not get the *Wall Street Journal*, may call her neighbor to determine the price of hogs before making a

C.A.), where the court refused a prohibition order concerning "acts or things" directed towards an agreement or arrangement because such acts did not constitute an offence under the *Competition Act*.

⁴⁷ See Commissioner of Competition, Competition Bureau, *Annual Report for the Period Ending March 31, 2000* (Ottawa: Minister of Supply and Services Canada, 2000) at 24 ("Laser Hair Removal: Conspiracy": "The Bureau examined an incident in which a competitor approached a hair removal company to set up an agreement to stop competing and raise prices. The Bureau contacted the competitor who was trying to eliminate competition and explained the consequences of the proposed action under the *Competition Act*. The potential agreement was never implemented and prices did not go up."); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1961* (Ottawa: Ministry of Supply and Services, 1961) at 18: "[W]hile the suggestions [of price fixing] had received serious consideration, they had fallen short of actual adoption."

⁴⁸ Subsections 50(1)(b) and (c) make illegal certain conduct that has an effect or tendency of substantially lessened competition or is designed to have such effect. As stated in *R. v. Hoffmann-LaRoche Limited* (1980), 109 D.L.R. (3d) 5 at 46, *affirmed* 125 D.L.R. (3d) 607: "The additional element consists of two possible alternatives: one dealing with the effect of the policy and another dealing with a mens rea element. Either will suffice; both are not required. Thus, if engaging in a policy of selling at unreasonably low prices has the effect or tendency of substantially lessening competition or of eliminating a competitor, the offence is complete. So, too, even if there is no such actual effect or tendency, but the conduct was designed to have the effect or tendency of substantially lessening competition or of eliminating a competitor, the offence is committed. Thus, to engage in a policy of selling at unreasonably low prices with the intention that this will substantially lessen competition or eliminate a competitor is criminal, even though the tactic is entirely ineffective in achieving its aim."

⁴⁹ The better view appears to be that *Sherman Act*, §1 cases cannot be proved with evidence of bad intent alone. See Holmes, note 37, *supra*, at 333, n. 14; *California Dental Ass'n v. Federal Trade Commission* (2000), 224 F.3d 942 at 948 (9th Cir.), which rejected purported "bad intent" evidence as too "ambiguous" and "superfluous" to be of assistance to the court's analysis; P.E. Areeda and H. Hovenkamp, *Antitrust Law* (New York: Aspen Law & Business, 1997) (hereafter "*Areeda & Hovenkamp*") at ¶1506: "[A]n admitted intention to limit competition will not make illegal conduct that we know to be procompetitive or otherwise immune from antitrust control."

⁵⁰ *Treaty of Rome*, Article 81(1); *Consten and Grundig*, [1966] E.C.R. 299 at 342: "[T]here is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition." Our approach would also be consistent with the legislative model proposed in Bill C-256, which would have rendered liable all persons who entered into an agreement that "has, is intended to have or, if implemented would be likely to have ... one or more of the effects described ...," as well as the Australian *Trade Practices Act* of 1974.

sale";⁵¹ or "two kids selling newspapers on opposite sides of the street"⁵² may decide to fix prices. Our response to such examples would be threefold:

- First, we would expect the Crown to continue to exercise some judgement (*i.e.*, prosecutorial discretion) in determining those cases that did or did not merit the expenditure of government resources to litigate;⁵³
- Second, the decision in *PANS* would continue to stand for the proposition that no conviction can be entered against an accused who could not reasonably have known the anti-competitive effect of the agreement or arrangement; and
- Third, the exemption for ancillary restraints, which is discussed below,⁵⁴ would eliminate the vast majority of concern with regard to agreements or arrangements that only indirectly had some effect on competition by raising the threshold of liability in such instances to capture only those agreements or arrangements that substantially impacted on competition, where such impact was reasonably foreseeable at the time that the agreement or arrangement was entered into.

Moreover, we would anticipate, and hope, that the Commissioner would issue a *de minimis* block exemption⁵⁵ for agreements and arrangements involving only small market shares, as has been done in the European Community.⁵⁶

⁵¹ Hovenkamp, note 23, *supra*, at 217.

⁵² Stanbury, note 9, *supra*, at 88.

⁵³ See Part B.2(b). The avoidance of section 36 actions would lie in the hands of the parties to the applicable agreement or arrangement, who could seek a clearance certificate. See Part C.1(b)(5).

⁵⁴ See Part C.1(b)(3).

⁵⁵ See Part C.1(b)(5) and note 56, *infra*.

⁵⁶ There is no block exemption for 'minor agreements,' as such, but, rather, the European Court of Justice has indicated that only agreements having an appreciable affect on competition fall within Article 81(1) and the European Commission has offered some guidelines as to where the boundary between those agreements having an appreciable affect on competition, and those that do not, lies. See European Commission, *Notice on Agreements of Minor Importance*, found at http://europa.eu.int/comm/competition/antitrust/legislation/s971799_en.html (accessed on Aug. 6, 2001), which indicates that agreements will be considered to fall outside of Article 81(1) where the market share of the parties to the agreement is less than 5% in the case of horizontal agreements (and 10% in the case of vertical agreements), as well as European Commission, *Draft Notice on Agreements of Minor Importance*, found at http://europa.eu.int/comm/competition/oj_extracts/2001_c_149_05_19_0018_OC20_en.pdf (accessed on Aug. 21, 2001), which would raise such thresholds to 10% and 15%, respectively. No safe harbour is offered in relation to agreements concerning price fixing, output limitation or market sharing. (*Ibid.*, ¶¶ 9 and 11.) We would anticipate the Commissioner adopting a similar safe harbour in a *de minimis* block exemption, but would envision the exemption operating with respect to all agreements regardless of their purpose or effect. We would not preclude the exemption from operating with respect to "hard core" agreements, as cost savings can be achieved from - for example - customer or market allocations without any fear of harmful impacts on the economy. We note that the U.S. *Competitor Collaboration Guidelines*, note 36, *supra*, at 8, would not permit "cost savings without integration" when based upon "coordination of decisions on price, output, customers, territories, and the like." We do not accept that cost savings and other efficiencies resulting from such coordinated efforts ought to be so blindly ignored when the competitors have a *de minimis* combined market share. An example that serves to demonstrate our divergence with U.S. policy is provided in Example 5 of the U.S. *Competitor Collaboration Guidelines*, note 36, *supra*, at 30-1, which concerns 2 of 3 carburetor manufacturers agreeing to share design work without integration of their production operations. The U.S. guidelines would condemn the conduct, regardless of the market share held by the collaborators, while we would exempt the collaboration if the collaborators' combined market share was *de minimis*. In this regard, we fail to appreciate the distinction between integration of the kind sought by the U.S. guidelines with integration generally. Clearly, competitors that collaborate on marketing, design and other non-physical aspects of their businesses integrate those activities to some extent, whether demonstratively visible or not. See also U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* (August, 1996) at 54, *et seq.* (hereafter "U.S. Health Care Guidelines") at 64-65: "The Agencies will not challenge, absent

(iii) "Fixing, stabilizing or otherwise affecting prices in or of a market"

The Draft Code would capture in the *per se* net all agreements or arrangements between or among competitors that fixed prices, stabilized prices or otherwise affected prices. Naturally, the final words merit comment. Under existing Canadian law, agreements that:

- (1) fix minimum prices;⁵⁷
- (2) elevate or "pad" prices;⁵⁸
- (3) eliminate discounts, rebates or credit terms;⁵⁹
- (4) establish margins for various levels of trade;⁶⁰ and
- (5) fix bids;⁶¹

are all potentially captured under subsection 45(1) of the *Competition Act*. The Draft Code would continue to render such agreements and arrangements liable to attack.

No doubt the words "or otherwise affect prices" would be construed using the *ejusdem generis* principle, thus confining its application somewhat. Nevertheless, we believe our language would also potentially capture:

- (6) price information exchanges between or among competitors to the extent that such exchanges were intended to, or did, affect prices;⁶²

extraordinary circumstances, an exclusive physician network joint venture where physician participants share substantial financial risk and constitute 20 percent or less of the physicians [in the relevant market]." Naturally, a *de minimis* exemption would enable parties to defend themselves on the basis that their market share was not higher than the minimum threshold - because, for example, copper piping actually competes with plastic piping - but the burden should not prove too onerous on the Crown, particularly when compared with the nature of conspiracy litigation today. (Note that the U.S. Department of Justice will weigh the volume of commerce involved in exercising its prosecutorial discretion. See U.S. Department of Justice, *Antitrust Division Manual*, Ch. 3 ("B. Recommending a Preliminary Inquiry"), found at www.usdoj.gov/atr/foia/divisionmanual/table_of_contents.htm (accessed on Aug. 6, 2001).)

⁵⁷ *Gage*, note 12, *supra*; *Stinson-Reeb Builders Supply Co. Ltd. v. The King*, [1929] S.C.R. 276; *R. v. Northern Electric Co.*, [1955] O.R. 431 (Ont. H.C.) (hereafter "*Northern Electric*"); *R. v. Morrey* (1956), 26 C.P.R. 55 (B.C.C.A.); *R. v. Canadian Coat & Apron Supply Ltd.* (1967), 2 C.R.N.S. 62 (Exch. Ct.) (hereafter "*Canadian Coat*"). See also *Bayda*, note 13, *supra*; Director of Investigation and Research, *Combines Investigation Act, Annual Report for the Year Ended March 31, 1971* (Ottawa: Ministry of Supply and Services, 1971) at 45 ("Building Materials - British Columbia").

⁵⁸ See *R. v. Dominion Steel and Coal Corp. Ltd.* (1956), 27 C.P.R. 57 (hereafter "*Dominion Steel*"); *B.C. Pharmacists*, note 12, *supra*; *R. v. Aluminum Co. of Canada*, [1977] 29 C.P.R. (2d) 183 (hereafter "*Aluminum Can.*").

⁵⁹ See *R. v. B.C. Television Broadcasting System Ltd.* (1980), 52 C.P.R. (2d) (B.C.S.C.); *Clarke Transport*, note 31, *supra*.

⁶⁰ See *Beckett*, note 12, *supra*; *Clarke*, note 12, *supra*; *Wholesale Grocers*, note 12, *supra*.

⁶¹ See *R. v. Alexander*, [1932] 2 D.L.R. 109 (Ont. H.C.J.); *McGavin Bakeries*, note 12, *supra*; *R. v. Crown Zellerbach Can. Ltd.* (1955), 15 W.W.R. 563, *affirmed* (1956), 20 W.W.R. 523 (B.C.C.A.) (hereafter "*Crown Zellerbach*"); *Northern Electric*, note 57, *supra*; *Lyons Fuel*, note 12, *supra*; *R. v. J.J. Beamish Construction Co. Ltd.* (1967), 53 C.P.R. 43, [1968] 1 O.R. 5 (C.A.). See also *Competition Act*, s. 47.

⁶² See *R. v. Armco Canada Ltd.* (1976), 13 O.R. (2d) 32, *leave to appeal refused* (1977), 13 O.R. (2d) 32n (S.C.C.) (hereafter "*Armco*"); *Aluminum Can.*, note 58, *supra*; *Canada Packers*, note 33, *supra*. See also Director of Investigation and Research, *Combines Investigation Act, Annual Report for the Year Ended March*

- (7) agreements to publish recommended prices;⁶³
- (8) marketing joint ventures, agency appointments or marketing companies between or among, or formed by, competitors;⁶⁴ and
- (9) agreements to price based on benchmarks, guidelines, base point systems or announced prices.⁶⁵

31, 1961 (Ottawa: Ministry of Supply and Services, 1961) at 18: "Electrical Equipment: ... The evidence obtained indicated that the companies regularly came into possession of their competitor's price lists and that those firms which did not initiate price changes adopted those of others in their own lists. The evidence[, however,] did not indicate ... [an agreement]."; Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1956* (Ottawa: Ministry of Supply and Services, 1956) at 18: "[T]he Commission found [that a system] of preparing Price Guides and circulating them to the members of the trade, was designed to establish price uniformity and succeeded in bringing about a substantial curtailment of price competition."; Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1976* (Ottawa: Ministry of Supply and Services, 1976) at 25 ("Construction Materials (Plastic Pipe and Fittings)") and 31 ("Fluid Milk - Southern Ontario"). In the U.S., see *Maple Flooring Mfrs' Ass'n. v. U.S.*, (1925), 268 U.S. 563; *U.S. v. Container Corp. of America* (1969), 393 U.S. 333; *Potash*, note 39, *supra*.

⁶³ See *Vimpoltu*, [1983] 3 C.M.L.R. 619.

⁶⁴ See *Container Materials*, note 12, *supra*; *Allied-Chemicals*, note 12, *supra*; *PANS*, note 12, *supra*. See also Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1974* (Ottawa: Ministry of Supply and Services, 1974) at 34 ("Transparent Sheet Glass"); *U.S. v. American Smelting and Refining Co.*, [1960] Trade Cas. ¶ 69,675 (N.Y.S.D.); *Virginia Excelsior Mills, Inc. v. Federal Trade Commission* (1958), 256 F.2d 538 (4th Cir.); Stigler, note 28, *supra*, at 234-35: "The most efficient [form of collusion] is the joint selling agency, for then price cutting is impossible and any large, hidden movement of goods is also virtually impossible."; Bellamy & Child, note 44, *supra*, at 212-13: "In certain circumstances undertakings may seek to cooperate in the joint selling of their products, for example through a joint subsidiary formed for the purpose, or a joint sales agency. However, Article 85(1) [now 81(1)] proceeds on the basis that every undertaking must compete independently and not co-ordinate its activities with any other undertaking unless the agreement is exempted under Article 85(3) [now 81(3)]."; European Commission, "Commission Notice: Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements," found at http://europa.eu.int/comm/competition/oj_extracts/2001_c_003_01_06_0002_0030_en.pdf at ¶149 (accessed on Aug. 6, 2001) (hereafter "*European Commission Notice on Horizontal Cooperation Agreements*"); "Commission Notice Concerning the Assessment of Cooperative Joint Ventures Pursuant to Article 85 [81] of the EC Treaty," found at http://europa.eu.int/comm/competition/antitrust/legislation/93c4302_en.html at ¶¶ 38 and 60 (hereafter "*European Commission Notice on Cooperative Joint Ventures*"). The appointment of a competitor as a selling agent might also contravene paragraph 45(1)(b) of the Draft Code, where it would restrict supply in a market, and also would likely contravene paragraph 45(1)(d) of the Draft Code. In the latter regard, the operation of subsection 45(1) hinges on the fact that the agreement involves competitors that compete in the affected market; hence, any agreement between or among competitors that involves the appointment of one of them to act as the agent of the others would almost certainly be seen as an allocation of the principal's customers to the agent. We would expect the Commissioner to issue a block exemption for such agreements, which might apply where market shares were below a specified threshold, such as 10 or 20%. In Europe, a threshold of 15% is used to divide those "joint commercialisation" agreements that are unlikely to reflect market power, from those that require greater review. Further, where "the joint commercialisation represents no more than a sales agency with no investment, it is likely to be a disguised cartel and as such cannot fulfil the conditions of Article 81(3)." Nevertheless, where a sales agency leads to "[c]ost savings through reduced duplication of resources and facilities" the sales agency may be exempted. See *European Commission Notice on Horizontal Cooperation Agreements*, *ibid.* at ¶¶ 143-53. See also *MacEwan v. Toronto General Trusts Corporation* (1917), 54 S.C.R. 381; *Floral*, [1980] 2 C.M.L.R. 285; *U.S. Competitor Collaboration Guidelines*, note 36, *supra*, at 28 ("Example 1").

⁶⁵ See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1973* (Ottawa: Ministry of Supply and Services, 1973) at 39 ("Hearing Aid Batteries - Calgary"); *Federal Trade Commission v. Cement Inst.* (1948), 333 U.S. 683; *Sugar Inst. Inc. v. U.S.* (1936), 297 U.S. 553; *U.S. v. Trenton Potteries Co.* (1927), 273 U.S. 392.

While paragraph 45(1)(b) of the Draft Code would not appear to capture in the *per se* net *Abitibi*⁶⁶-type buying groups because the effect in the upstream market is not one in which the parties to the agreement or arrangement compete,⁶⁷ such agreements and arrangements would be caught in paragraph 45(1)(d) of the Draft Code.⁶⁸

(iv) "Eliminating or restricting capacity, output or supply in, of or to a market"

Some would argue that the only sure way of affecting prices in a market is to address output. Accordingly, it is imperative that output limitations be captured in the *per se* net. We believe the following would fall within the scope of our proposed paragraph 45(1)(b):

- (1) agreements with respect to production quotas;⁶⁹
- (2) agreements to shut down plants;⁷⁰
- (3) agreements to purchase production from another competitor in order to avoid such product being sold into a market;⁷¹
- (4) agreements to cease production of a product in favour of a distribution agreement with a competitor;⁷²

⁶⁶ *R. v. Abitibi Power and Paper Co.* (1960), 131 C.C.C. 201 (Que. Q.B.).

⁶⁷ See further Part C.1(a)(1)(vi). We acknowledge that there is some room for argument in this regard.

⁶⁸ See further Part C.1(a)(1)(vii). We would anticipate the Commissioner making the position clear through a block exemption.

⁶⁹ See *Zinc Producer Group*, [1985] 2 C.M.L.R. 108; *ACG Chemiefarma v. Commission*, [1970] ECR 661 at 699; *Lightweight Paper*, [1972] C.M.L.R. D94.

⁷⁰ See *Allied Chemical*, note 12, *supra*. See also Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1974* (Ottawa: Ministry of Supply and Services, 1974) at 34 ("Transparent Sheet Glass"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1978* (Ottawa: Ministry of Supply and Services, 1978) at 45 ("Lumber - South-East, British Columbia"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1971* (Ottawa: Ministry of Supply and Services, 1971) at 50 ("Construction Material"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1968* (Ottawa: Ministry of Supply and Services, 1968) at 51 ("Proposal B"); Commissioner, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1939* (Ottawa: Ministry of Supply and Services, 1939) at 5 ("Paperboard Shipping Container Investigation").

⁷¹ See *R. v. Canadian Import Co.*, [1935] 3 D.L.R. 330 (S.C.C.), *leave to appeal refused* [1935] A.C. 500. See also Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1974* (Ottawa: Ministry of Supply and Services, 1974) at 27 ("Sulphur - Western Canada": agreement to stockpile sulphur); *U.S. v. Socony-Vacuum Oil Co.* (1940), 310 U.S. 150; *Zinc Producer Group*, [1985] 2 C.M.L.R. 108; *Aluminum Imports from Eastern Europe*, [1987] 3 C.M.L.R. 813.

⁷² See *Allied Chemical*, note 12, *supra*. See also Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1974* (Ottawa: Ministry of Supply and Services, 1974) at 34 ("Transparent Sheet Glass"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1978* (Ottawa: Ministry of Supply and Services, 1978) at 45 ("Lumber - South-East, British Columbia"); *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra* at ¶140, *et seq.*; *Rolled Zinc Products and Zinc Alloys*, [1983] 2 C.M.L.R. 285; *Prym/Beka*, [1973] O.J. L296/24. Recently, the scope of the Commission Regulation (EC) No. 2659/2000 (Nov. 29, 2000) "On the Application of Article 81(3) of the Treaty to Categories of Specialisation Agreements," found at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!JO_RefPub&lg=EN&serie=jo-L&an=jo=2000&nu=jo=304&pg=jo=0007 (hereafter "*Block Specialisation Agreement Exemption*"), *supra* at ¶1(1)(a) was broadened to exempt "unilateral specialisation agreements" meaning "agreements, by virtue of which one party agrees to cease production of certain products or to refrain from producing those products and to purchase them from a competing undertaking, while the competing undertaking agrees to produce and supply those products."

as well as more esoteric forms of output restrictions, such as:

- (5) agreements to coordinate the timing and duration of maintenance shutdowns;
- (6) agreements to not increase capacity without consent;⁷³
- (7) agreements to restrict hours of operation;⁷⁴ and
- (8) agreements to restrict delivery services for small order purchases.⁷⁵

As may be inferred from the foregoing, we would hope that a court would read the words "capacity, output or supply" in a broad manner to capture *qualitative*, as well as quantitative, restrictions on products produced or supplied in a market.⁷⁶

(v) *"Impeding expansion or entry in, of or into a market"*

Agreements by competitors to deny a market participant entry into a market, or impede another participant's ability to expand in a market, are forms of output restrictions that ought to be similarly caught within the *per se* net. Examples of conduct that would be captured by proposed paragraph 45(1)(c) include:

- (1) agreements among members of a trade association to deny membership to a new or potential entrant to the industry, where membership was important to the entrant's ability to compete;⁷⁷
- (2) agreements with respect to technical standards, which have the effect of impeding entry or expansion in respect of a market;⁷⁸ and
- (3) agreements with respect to certification standards, such as ISO 14000 or CSA, which are denied to other participants or potential participants in a market.⁷⁹

The scope of the provision might also capture agreements between competitors that, through a joint venture or otherwise, jointly control strategic resources necessary for third parties to effectively compete.⁸⁰ For example, an agreement between two competitors to acquire a rare stockpile of a

⁷³ See *Zinc Producer Group*, [1985] 2 C.M.L.R. 108.

⁷⁴ See *Tennessee v. Highland Memorial Cemetery* (1980), 489 F. Supp. 65 (E.D. Tenn.).

⁷⁵ See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1972* (Ottawa: Ministry of Supply and Services, 1972) at 22 ("Stove Oil - Salmon Arm, B.C."). See similarly Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1971* (Ottawa: Ministry of Supply and Services, 1971) at 45 ("Building Materials - British Columbia"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1968* (Ottawa: Ministry of Supply and Services, 1968) at 42 ("Household Furnishings, Toronto").

⁷⁶ As in the case of Europe, it may be necessary, and indeed desirable, for the Commissioner to issue a block exemption in respect of agreements made between contractors and subcontractors. See also note 182, *infra*.

⁷⁷ See *Bank of Montreal v. Canada* (1996), [unreported] (Comp. Trib.); *B.C. Fruit Growers*, note 12, *supra*; *Cauliflowers*, [1978] 1 C.M.L.R. D66; *Sarabex*, [1979] 1 C.M.L.R. 262.

⁷⁸ See *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 at 618.

⁷⁹ See *Radiant Burners Inc. v. People's Gaslight and Coke Co.* (1961), 364 U.S. 656 (hereafter "*Radiant*"); *Video Cassette Recorders*, [1978] 2 C.M.L.R. 160.

⁸⁰ See *Radiant*, *ibid*.

strategic mineral used as a raw material or input in their manufacturing processes might attract liability, in the absence of an exemption.⁸¹

- (vi) "Allocating, ceasing to supply or purchase, or otherwise affecting relations of either or any of them with one or more of any of their customers in, or suppliers to, a market"

It is trite that the allocation of customers as between or among competitors falls within the classic description of a "hard core" cartel. The Draft Code would also capture as *prima facie per se* illegal all those agreements or arrangements between or among competitors relating to a refusal to deal with a customer, supplier or class of customers or suppliers, as well as agreements or arrangements otherwise affecting relations of either or any of them with one or more of any of their customers or suppliers.⁸² We believe the language in paragraph 45(1)(d) would therefore capture:

- (1) upstream and downstream group boycotts;⁸³
- (2) market or territorial allocation agreements, as such agreements undoubtedly affect relations with customers;⁸⁴
- (3) agreements to cut back supply to a customer or group of customers, even though not affecting supply or output within the market generally;
- (4) agreements to alter standard contract terms with customers, whether or not done on an industry-wide basis;⁸⁵
- (5) agreements to limit the period within which negotiations with customers will take place;⁸⁶ and

⁸¹ The exemption for acquisitions of assets only might apply in such circumstances, provided the assets were acquired in specified undivided interests with no restraints on the subsequent use thereof. See Part C.1(b)(4).

⁸² While there is some divergence in views as to whether or not exclusionary boycotts effected between or among competitors ought to be classified within the category of a "hard core" cartel (see *OECD Report*, note 15, *supra*, n. 3), such conduct is often in furtherance of a cartel or the formation of a cartel. Moreover, because the conduct is often severe in its impact on an excluded participant, one cannot help but conclude that the provision of a remedy (i.e., section 36) for the excluded participants would serve to: (i) assure the business community that Canada's competition law has teeth and can redress conspiratorial behaviour, (ii) avoid the dissemination of exactly the opposite message and (iii) assist in uncovering more economically harmful conduct, such as in the early grocery, lumber, electrician and plumbing cases. See further Study, Appendix 1 and note 12, *supra*; *Federal Trade Commission v. Superior Court Trial Lawyers Association* (1990), 493 U.S. 411; *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* (1985), 472 U.S. 284; *Federal Trade Commission v. Indiana Federation of Dentists* (1986), 476 U.S. 447; *Fashion Originator's Guild of America, Inc. v. Federal Trade Commission* (1941), 312 U.S. 457; R. McQuinn, "Boycott Law After *Northwest Wholesale Stationers*" (1989), 57 *Anti-L.J.* 839; Holmes, note 37, *supra*, at 390: "While it remains unclear at the Supreme Court level where all of this leaves us, the definite trend at the appellate court level has been to require proof of the defendants' shared market power or control over a key resource of facility (or efforts to seize such control through the boycott) before applying the per se boycott standard."

⁸³ See Appendix 4, Example (1).

⁸⁴ See *McGavin Bakeries*, note 12, *supra*; *Crown Zellerbach*, note 61, *supra*; *Canadian Coat*, note 57, *supra*. See also *Timken Roller Bearing Co. v. U.S.* (1950), 341 U.S. 593; *Peroxygen Products*, [1985] 1 C.M.L.R. 481.

⁸⁵ See *R. v. Anthes Business Forms Ltd.* (1975), 10 O.R. (2d) 153, *affirmed* [1978] 1 S.C.R. 970 (hereafter "Anthes"); *Famous Players*, note 12, *supra*. See *Paramount Famous Lasky Corp. v. United States* (1930), 292 U.S. 30 and *United States v. First National Pictures, Inc.*, (1930) 282 U.S. 44. See also *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, (1999) 182 F.3d 1096, 1103 (9th Cir.) (finding an illegal boycott in the defendants' conduct "for the purpose of coercing more favorable terms from third parties than they could obtain through the normal play of competitive forces").

(6) buying groups.⁸⁷

We recognize that the wording in paragraph 45(1)(d) is potentially wider in scope than Article 81(1) the *Treaty of Rome* or §1 of the *Sherman Act*,⁸⁸ but would posit the view that, in the absence of a clearance certificate, competitors should virtually never be engaged in discussions, commitments or agreements that affect one or more of their customers or suppliers, particularly where a defence is readily available for ancillary restraints.⁸⁹ Buying groups are an exception, where we would hope that the Commissioner would issue a block exemption removing them from challenge under the Draft Code, in the absence of extraordinary circumstances.⁹⁰

(vii) *Between or Among Competitors*

While the existing law of criminal conspiracy in Canada would appear to capture vertical, as well as horizontal, agreements and arrangements,⁹¹ the Draft Code would clearly embrace only agreements or arrangements where the parties thereto, or their affiliates, or two or more of them, compete in the affected market.⁹² One of the significant implications of the wording in the Draft Code is that vertically imposed restraints would not be *per se* illegal.⁹³ Also, we would not capture agreements or arrangements between *potential* competitors, which generally should be pursued under a civil standard in our view.⁹⁴

⁸⁶ See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1972* (Ottawa: Ministry of Supply and Services, 1972) at 24 ("Millwork - Southern Ontario"); *National Society of Prof. Eng. v. U.S.* (1978), 435 U.S. 679.

⁸⁷ See Appendix 4, Example (2).

⁸⁸ For example, group boycotts are not necessarily treated under a *per se* illegal standard in the U.S. See note 82, *supra*. In Europe, see *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra*, Part 6 and *Vimpolva*, [1983] 3 C.M.L.R. 619. Agreements between producers and distributors that are also producers (i.e., dual distributors) raise a number of interesting problems. For example, an agreement by a producer that it will not sell in competition with the dual distributor would *prima facie* offend paragraph 45(1)(d) and the parties would be required to disclose their proposed agreement to the Commissioner. We cannot conclude, however, that such agreements never should be caught in the first place. See *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra*, at ¶11.

⁸⁹ Common agreements, such as "swap" transactions, agreements to provide "mutual aid" in events of *force majeure* or order-filling assistance between competitors, would not offend the provision, as such agreements do not affect the *relations* between a competitor and its customers. Nevertheless, we would expect the Commissioner to issue a block exemption make the position clear. See further Bellamy & Child, note 44, *supra*, at 215: "There is no objection to two undertakings collaborating to execute a specific order, if neither can complete the order by itself," citing *Eurotunnel*, [1989] 4 C.M.L.R. 419, among other decisions, and Notice on Co-operative Agreements § II(6) [now *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra* (see ¶24)]; *Ibid.* at 200, ¶ 4-061.

⁹⁰ See similarly *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra* at ¶¶130-31; *U.S. Health Care Guidelines*, note 56, *supra* at 54, *et seq.* See also Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1953* (Ottawa: Ministry of Supply and Services, 1953) at 17 ("The Maple [Sugar] Report"); *National Sulphuric Acid Association*, [1980] 3 C.M.L.R. 429; *SOCOMAS*, [1968] C.M.L.R. D28; *Arizona v. Maricopa County Medical Society* (1982), 457 U.S. 332.

⁹¹ *R. v. Canadian General Electric Co. Ltd.* (1976), 75 D.L.R. (3d) 664 (Ont. H.C.) (hereafter "CGE") (vertical conspiracy alleged, albeit unsuccessfully); *R. v. Nova Scotia Pharmaceutical Society*, (1993) 49 C.P.R. (3d) 289 (N.S.S.C. on remand from S.C.C.) at 313 per Boudreau, J.: "In my view, it is not necessary that a combination, agreement or arrangement be strictly horizontal in order for it to offend s. 32 [now 45]."

⁹² The Draft Code would examine the competitive interests of each person to the applicable agreement or arrangement on an "enterprise" basis, consistent with European law. See Bellamy & Child, note 44, *supra*, at 63; Part C.1(b)(3).

⁹³ See Appendix 4, Examples (3) and (4).

⁹⁴ See Appendix 4, Example (11).

(viii) "A market"

The use of the word "market" in the Draft Code would no doubt attract attention from defence counsel, who might argue, for example, that the Crown must prove that:

- (1) the parties to the alleged agreement or arrangement *compete* within one or more markets;
- (2) the alleged *effect* of such agreement or arrangement occurred in one or more of such markets; and
- (3) the market, as a whole, was *affected* by the agreement or arrangement.⁹⁵

Our expectation is that a court would normally conclude that defence counsel was correct on the first two points and only partially correct on the final point.

With respect to the first two points, it is a fundamental element of the *per se* net in the Draft Code that a potentially illegal agreement or arrangement involves competitors. The burden on the Crown in demonstrating that the accused are competitors should not prove too onerous in most instances, although there would be cases where significant evidence on the point was necessary.⁹⁶ Legislative models that might avoid such an inquiry appear far too broad in potential scope to consider; hence, the burden of demonstrating such elements is a necessary part of the Crown's task in obtaining a conviction.

With respect to the third point, the *per se* net would capture all those agreements or arrangements entered into for the *purpose* of affecting prices, output, etc., and no market inquiry would be necessary if such purpose could be proven.⁹⁷ With respect to those agreements or arrangements that had an *effect* on prices, output, etc., but not the purpose of doing so, a market impact assessment could be necessary under the Draft Code, depending upon the charges laid. For example:

- a charge that prices *in* a market were fixed,⁹⁸ that capacity, output or supply *in, of or to* a market was eliminated or restricted,⁹⁹ that expansion *in or of*¹⁰⁰ a market was impeded, that entry *into* a market was impeded, that customers *in* a market were allocated, or that suppliers *to* a market were boycotted by agreement or arrangement between or among competitors would clearly not require any market impact analysis; whereas

⁹⁵ Reference might also be made to Bill C-256 by defence counsel, which would have included within the definition of "market": (a) a geographical area, (b) a customer or number of customers or (c) a supplier of number of suppliers. See Bill C-256, s. 2(1)("market").

⁹⁶ See *Clarke Transport*, note 31, *supra*; Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1974* (Ottawa: Ministry of Supply and Services, 1974) at 28 ("Rye Bread - Montreal"); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1975* (Ottawa: Ministry of Supply and Services, 1975) at 31 ("Hot Mastic Asphalt - Ontario").

⁹⁷ See note 48, *supra*.

⁹⁸ For example, a charge that X and Y did fix or otherwise affect the prices in the market of refined sugar by agreeing to eliminate discounts would not require a market analysis. On the other hand, we do not believe that circumstances are likely to arise in which prices could be said to have been stabilized *in* a market without stabilizing the market as a whole. See note 101, *infra*.

⁹⁹ The elimination of capacity *within* a market would no doubt eliminate capacity *of* the market.

¹⁰⁰ The expansion *of* a market might be impeded by two competitors that agreed to suppress new technology for a period of time. While, no doubt, either could independently determine to suppress the technology, the agreement between them would render their conduct unlawful under the Draft Code. See Appendix 4, Example (11).

- a charge that prices of a market were stabilized or otherwise affected, or that customers in or suppliers to a market were otherwise affected, by agreement or arrangement between or among competitors may require a market analysis.¹⁰¹

We believe that a market impact analysis is necessary and appropriate in those latter instances in which the Crown lacks evidence of an intention to harm competition and the effects on competition are indirect.

(2) Clarification of Law

(i) Foreign Conspiracies

45. (2) For purposes of certainty, any person that enters into an agreement or arrangement referred to in subsection (1) for the purpose or having the effect of affecting, in the manner set forth in any of paragraphs (1)(a), (b), (c) or (d), any market wholly or partially within Canada, irrespective of whether or not the person or any of the persons to the agreement or arrangement is located or has a presence in Canada, is guilty of the offence.

In our view, Canada's competition law ought to extend to all conspiracies, wherever formed, that impact upon the Canadian economy, subject to rules of international comity.¹⁰² At present, it may be argued that the *Competition Act* does not capture all such conspiracies. In particular, it may be argued that Canada's conspiracy law only applies to conspiracies:

- "entered into in Canada"; or
- "entered into outside Canada," but "implemented" in Canada by a corporation "that carries on business in Canada" through a "directive, instruction, intimation of policy or other communication [made] ... for the purpose of giving effect to [it]."¹⁰³

Thus, price-fixing agreements made in Japan by foreign companies with no presence at all in Canada may not be captured ("*Wholly-Foreign Conspiracies*"), even if they substantially raise the price of products purchased by Canadian buyers.¹⁰⁴

¹⁰¹ For example, a charge that X, Y and Z did agree to circulate price lists of foreign importers amongst themselves for the purpose of ensuring that dumping was actively pursued by the Canadian Customs and Revenue Agency, which had the effect of stabilizing prices of the market of hot rolled steel, would require proof that the behaviour of X, Y and Z, acting alone, could and did have the effect of stabilizing prices in the market for hot rolled steel. The example is one where we would expect the Commissioner to seek a resolution other than through contested litigation proceedings, such as a prohibition order.

¹⁰² This standard is in keeping with the "effects test," which has been adopted by many foreign jurisdictions. See A.C. Gourley, "Information Flow Across the Border: Is the Bureau of Competition Policy Considering the 'Public Interest' Factor?" (1995), 27 Ott. L. Rev. 233 at 235 (hereafter "*Gourley*"). We would anticipate the Commissioner issuing a block exemption or statement in respect of agreements and arrangements having only an indirect or minor effect upon the Canadian economy. See U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (April, 1995) at 20-23; *Gourley, ibid.*, at 246-249; *Hartford Fire Insurance v. California* (1993), 509 U.S. 764 at 795-96: "Although the proposition was perhaps not always free from doubt, ... it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."; *Foreign Trade Antitrust Improvements Act*, 15 U.S.C.A. §6a and §45(a)(3).

¹⁰³ *Competition Act*, s. 46(1). Similarly, subsection 49(1) would not appear to apply to foreign banks doing business in Canada. See *Competition Law of Canada*, note 16, at 108-109, n. 4.

¹⁰⁴ J.F. Rook and J.M. Hovland, "A Competition Law Pot-Pourri" (Address to the Canadian Institute, 17 June 1994) [unpublished], argue that subsections 465(1)(c) and (4) of the *Criminal Code* "appear to overcome the limitations imposed by the courts on extra-territoriality." These provisions make it an offence to conspire with

We fail to see why Wholly-Foreign Conspiracies ought to be removed from the jurisdictional reach of Canada's conspiracy law, which is inconsistent with both European¹⁰⁵ and American law.¹⁰⁶ In our view, such an approach deprives Canadian consumers and businesses of redress for wrongs that are committed against them. Moreover, those wrongs would be actionable by foreign companies, if the circumstances were reversed.¹⁰⁷ While Canada traditionally has been far more concerned with the extraterritorial application of its laws than certain other countries, it would appear that the international standard of the "effects test" has now been firmly established.¹⁰⁸

Thus, the Draft Code deletes section 46 altogether.¹⁰⁹ Were section 46 never to have been introduced into law in the first place, the Canadian courts may have interpreted section 45 as applying to all agreements or arrangements having an effect on the Canadian economy;¹¹⁰ however, having introduced the provision, its removal might suggest that Parliament no longer intended to pursue any conspiracies formed outside of Canada. Hence, the Draft Code proposes a new subsection 45(2), which would make certain that Canadian law applies to Wholly-Foreign Conspiracies that are aimed at affecting, or otherwise do affect, markets within Canada, in whole or in part.¹¹¹

another person to commit an indictable offence and deem any person so conspiring outside of Canada to have conspired within Canada. We are not aware of any Canadian court considering these provisions in the context of the *Competition Act*, but doubt they could overcome the explicit language of section 46. See also *Competition Act*, s. 11(2).

¹⁰⁵ See *Ahlström v. Commission*, [1993] 4 C.M.L.R. 407; *Ansac*, OJ 1991 L152/54.

¹⁰⁶ See *American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347; *U.S. v. Aluminum Co. of America* (1964), 377 U.S. 271; *Hartford Fire Insurance v. California* (1993), 509 U.S. 764. See also *In the Matter of Institut Merieux S.A.* (1990), 113 F.T.C. 742 (merger case).

¹⁰⁷ Many international conspiracies that affect the Canadian economy involve a number of different parties, some with Canadian subsidiaries that make sales in Canada ("Actively Present Foreign Sellers"), others with mere sales or agency offices that perform only administrative and promotional functions in Canada ("Passively Present Foreign Sellers") and still others with no physical presence at all in Canada ("Purely Foreign Sellers"). Canadian businesses seeking to recover their damages from such parties currently face several procedural challenges should they include in their statement of claim either Passively Present Foreign Sellers or Purely Foreign Sellers. Should they include Purely Foreign Sellers, for example, those parties will assert that neither sections 45 nor 46 apply to them. Should they have purchased only from Purely Foreign Sellers and fail to include them in their statement of claim on the basis of joint and several liability, no doubt (in the absence of a defence sharing arrangement) the named defendants will deny liability and cross-claim against the Purely Foreign Sellers in any event. Similar and additional issues arise with Passively Present Foreign Sellers that arguably did not "implement" the foreign conspiracy in Canada. One could argue, therefore, that the existing law discourages foreign presence - hence investment - in Canada.

¹⁰⁸ See *Competition Law of Canada*, note 16, *supra*, Ch. 13, "International Aspects of Competition Law"; Gourley, note 102, *supra*, at 235. In *Libman v. The Queen* (1985), 21 C.C.C. (3d) 206 at 232, the Supreme Court of Canada stated that Canadian courts could assert jurisdiction in criminal matters where there was a real and substantial link between an offence and Canada.

¹⁰⁹ One commentator argues that section 46 may be unconstitutional in light of the fact that an accused may be convicted for implementing a foreign communication in furtherance of a conspiracy in Canada without ever knowing of the existence of the conspiracy. See S. Bradley, "Implementing Foreign Conspiracies: Guilty Notwithstanding?" (1993), 14 Can. Comp. Rec. 56.

¹¹⁰ See *Elliott*, note 12, *supra*, in which the alleged conspiracy involved, in part, refusals by U.S. coal dealers to sell wholesale to Ontario residents who were not members of the conspiring association. In affirming the trial conviction, Osler J.A. said: "It was contended that the combination was not within the statute because it affected only the supply at the source in a foreign country, but that is not its whole scope or limit by any means. It strikes at competition in this country in the supply and sale of coal here, and it is immaterial that it affects the conduct of the foreign vendor also, when that has reference to and affects persons resident here."

¹¹¹ The American approach to foreign cartels is threefold: amendments to the *Federal Trade Commission Act* and the *Sherman Act* make it clear that foreign trade is exempt from the application of these laws unless such conduct has a "direct, substantial and reasonably foreseeable effect" on domestic trade, the *Webb-Pomerene Act* and the *Export Trading Company Act of 1982*. The *Webb-Pomerene Act*, 15 U.S.C.A. §§ 61-66, grants immunity from the *Sherman Act* for certain trade associations registered with the Federal Trade Commission

The Draft Code would therefore capture:

- (1) Agreements among foreign competitors to fix the prices of products sold in any market, so long as that market includes Canada, in whole or in part;
- (2) Agreements among foreign competitors to restrict or eliminate output so long as that agreement affected prices or other elements of competition in Canada;
- (3) Agreements among foreign competitors that had the effect of impeding entry or expansion of another foreign or Canadian company in a market involving Canada, in whole or in part; and
- (4) Agreements among foreign competitors that had the effect of allocating, ceasing to supply or otherwise affecting relations with customers or suppliers in Canada.

We recognize that the scope for the extra-territorial application of Canada's conspiracy law would be considerably widened under the Draft Code, however, we would expect the Commissioner to issue a block exemption or a statement in respect of those international transactions that would or might offend the principles of comity between nations, if prosecuted.¹¹²

(ii) *Standard of Proof*

45. (3) In a prosecution under subsection (1), the court may infer the existence of an agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the agreement or arrangement must be proved beyond a reasonable doubt.

The existing law of conspiracy requires proof of several elements *beyond a reasonable doubt*.¹¹³

- (1) *Actus Reus*: The Crown must prove that (i) the accused entered into an agreement or arrangement; and (ii) the agreement or arrangement *unduly* lessened or prevented competition or, if implemented, *likely*¹¹⁴ would have had such an effect; and
- (2) *Mens Rea*: The Crown must prove that (i) the accused intended to enter into the agreement or arrangement; and (ii) the accused knew, or ought to have known, that the agreement or arrangement would have the requisite effect in respect of a market.¹¹⁵

The Draft Code would not substantially affect the mental or physical elements of the conspiracy offence. The Crown would still have to demonstrate that the accused did, and intended to, enter into an agreement or arrangement. Further, the Crown would have to prove that either (i) the agreement or arrangement affected competition in one of the prescribed ways (*i.e.*, fixed prices,

to engage in export trade, while the *Export Trading Company Act* of 1982, 15 U.S.C.A. §§ 4001-4021, enables a certificate of review to be issued that exempts proposed export activity from the antitrust laws.

¹¹² See note 102, *supra*. We would expect the Commissioner to adopt a test similar to the "direct, substantial and reasonably foreseeable effects" test used in the United States. See note 137, *infra*.

¹¹³ *PANS*, note 12, *supra*.

¹¹⁴ We find it difficult to reconcile how the Crown can demonstrate *beyond a reasonable doubt* that something was *likely* to occur.

¹¹⁵ We would delete subsection 45(2.2) of the *Competition Act* because it has been largely subsumed by *PANS*, note 12, *supra*, which we would anticipate would govern and influence the interpretation of the Draft Code.

limited output, etc.) and the accused knew, or objectively ought to have known, that such an effect would result or (ii) the accused intended to affect competition in one of the prescribed ways.

(iii) *Overlapping Provisions*

45. (5) No proceedings may be commenced under subsection 45(1) against a person against whom:

- (a) an order is sought under section 77, 79 or 92, or**
- (b) an application has been made by the Commissioner under section 83 for an order against that company or any other person**
on the basis of the same or substantially the same facts as would or have been alleged in proceedings under section 77, 79, 83 or 92, as the case may be.

There are a number of provisions that potentially overlap with subsection 45(1) of the *Competition Act*, including sections 75,¹¹⁶ 79, 83 and 92, which is explicitly recognized in section 45.1 of the *Competition Act* for the most part. Other provisions, including sections 47, 49, 61, 77-79 and 85-90, could overlap with subsection 45(1) of the Draft Code. We have addressed these sections individually in Part C.2 below.

(b) Exemptions

(1) Banks

45. (4) Subsection (1) does not apply in respect of an agreement or arrangement:

- (a) between or among federal financial institutions that is described in subsection 49(1)**

We would not alter the current exemption available for banks, which relates to subsection 49(1), and simply avoids double jeopardy. Moreover, we have not examined or made any proposals concerning section 49, which we consider to be beyond the scope of this report. There is certainly a compelling argument that could be made that the treatment of agreements and cooperative arrangements among financial institutions using a different standard than that employed for all other industries cannot be justified.

(2) Affiliates

45. (4) Subsection (1) does not apply in respect of an agreement or arrangement:

- ...
- (b) that is entered into only by persons each of which is, in respect of every one of the others, an affiliate**
- (6) For purposes of paragraph (4)(b),**
- (a) one corporation shall be deemed to be affiliated with another corporation if one of them holds securities carrying, or that may be forthwith converted into securities carrying, sufficient voting rights that may be cast to elect directors of the other so as to, without consideration of other factors, control or constitute a significant interest in such other;**
- (b) one partnership shall be deemed to be affiliated with another person if the person holds a sufficient interest that entitles the person to receive profits of the partnership or its assets on dissolution so as to, without**

¹¹⁶ While we have not examined the overlap between section 45 of the Draft Code and section 75 of the *Competition Act*, we note that it is possible for a refusal of supply to fall within both provisions.

consideration of other factors, control or constitute a significant interest in the partnership;

- (c) if two corporations or partnerships are affiliated with the same corporation or partnership at the same time pursuant to paragraphs (a) or (b), they are deemed to be affiliated with each other;

Perhaps one of the least considered, but most important, concepts in Canadian competition law is the inclusion and exclusion of related companies for differing purposes through the use of the "affiliate" definition.¹¹⁷ Subsection 45(8) of the *Competition Act* presently exempts all conspiracies "entered into only by companies each of which is, in respect of every one of the others, an affiliate." Pursuant to subsections 2(2), (3) and (4), corporations are affiliated with one another if one of them, directly or indirectly, "controls" the other or they are "controlled" by the same person. "Control" over a corporation¹¹⁸ is deemed to exist¹¹⁹ where more than 50% of a corporation's voting rights are held and those votes are sufficient to elect a majority of the directors of the corporation.

Since the acquisition of control over corporations is already regulated pursuant to Part VIII of the *Competition Act* (as a "merger"), the exemption under subsection 45(8) relating to the exercise of such control makes eminent sense. The question, however, is whether or not the exemption is broad enough. For example, where one person *de facto* controls a corporation, why should the exercise of that power result in criminal liability?¹²⁰ This is particularly so given the broad definition of a

¹¹⁷ The term, or a similar term or phrase, is used in sections 4.1, 11(2), 45(8), 47(3), 49(2)(i), 61(2), 77(4), 109(1), 110(3)(b), 110(6)(b), 113(a) and 117(1), although it is uniquely defined for purposes of subsections 77(4), 113(a) and 117(1) by subsections 77(5), 77(6), 108(2), 117(2) and 117(3). There is little case law considering the application of subsection 45(8). Many cases support the proposition that, for purposes of sentencing, related corporations ought to be grouped together, but few cases exist to shed light on the more difficult *Copperweld*-type questions. See *Copperweld Corp v. Independence Tube Corp.* (1984), 467 U.S. 752. In one case, captive sales were taken into account in reducing the level of the fine: *R. v. ABC Ready-Mix Ltd.* (1972), 17 C.P.R. (2d) 91 (Ont. H.C.J.). Perhaps the only substantive case that has considered subsection 45(8) to date is *Pindoff Record Sales Ltd. v. CBS Music Products Inc.* (1989), 27 C.P.R. (3d) 380 (Ont. H.C.), which has troubling implications. In *Pindoff*, the plaintiff sued CBS Music Products Inc., a Canadian subsidiary of CBS, Inc., along with CBS, Inc. The court accepted that a conspiracy between the parent and subsidiary companies could not survive subsection 45(8) relying on *Procter & Gamble (Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.)* (1986), 12 C.P.R. (3d) 430, but gave leave to the plaintiff to amend its statement of claim "to plead that certain defendants are [managing] directors" of CBS, Inc. or its Canadian subsidiary. The court stated that "While a company cannot conspire with ... its own high-placed officers, there are other corporate personnel with whom it could conspire" To the extent that the judge in *Pindoff* was referring to a criminal conspiracy, we disagree. A criminal conspiracy involves a lessening or prevention of competition; it is inconceivable that a conspiracy *intra-enterprise*, whether involving related companies or personnel, could ever lessen or prevent competition as contemplated in subsection 45(1). See further *Electrical Contractors*, note 12, *supra*, in which a natural person was found to have effected a conspiracy between two separate legal entities, which were not affiliated; *Canadian Dredge and Dock Co. Ltd. v. The Queen* (1985), 19 C.C.C. (3d) 1 (S.C.C.), which adopted the identification theory for finding liability in criminal conspiracy; *Dominion Steel*, note 58, *supra*, in which the court refused to exclude a subsidiary on the basis that it acted under the control of its parent. See also *Community Publishers, Inc. v. DR Partners* (1998), 139 F.3d 1180 (8th Cir.); *Chicago Professional Sports Ltd. Partnership v. NBA* (1996), 95 F.3d 593 (7th Cir.).

¹¹⁸ Other than a corporation controlled by Her Majesty the Queen.

¹¹⁹ There is an argument that these provisions do not exhaustively define or outline how corporations might be affiliated with one another, but for purposes of this report we have assumed that the definition is exhaustive. See Gourley & VanDuzer, note 43, *supra*, at § 3430, *et seq.*

¹²⁰ See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1968* (Ottawa: Ministry of Supply and Services, 1968) at 33 ("Report in the Matter of an Inquiry Relating to the Production, Manufacture, Sale and Supply of Laminated Timbers in Ontario and Quebec"), where the acquisition by a competitor of 20% of the voting stock of another, along with a seat on its board, enabled "an influence on its sales and distribution policy" and divestiture of the interest was recommended; Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1957* (Ottawa: Ministry of Supply and Services, 1957) at 19, where the acquisition of 41% of the shares of a competitor enabled the *de facto* parent to impose a management agreement on its *de facto* subsidiary. The Director treated the acquisition, along with the management agreement, under civil merger law. An example where arguably the exercise of *de facto* control (33% ownership) was treated criminally can be found in the

"merger," which almost certainly would have captured the *acquisition* of such control in the first place.¹²¹

Thus, in formulating a new exemption for affiliates, we started with several propositions:

- First, conspiracy law ought to treat two or more related persons as "speaking with one voice" only in the clearest of circumstances (e.g., *de jure* control);
- Second, if a corporation is able to exercise *de facto* control over another corporation, the *exercise* of that control should not be addressed under criminal law when it is open to the Commissioner to seek redress under Canadian merger law; and
- Finally, the line to be drawn between those corporations "speaking with one voice" and those acting as independent participants in the economy ought to be drawn in favour of the accused, particularly if a remedy otherwise exists to address the Commissioner's concerns.

As a result of these propositions, we have used the existing *de jure* affiliate definition (i.e., subsection 2(1) of the *Competition Act*) in the subsection 45(1) "net" which would serve as the test for purposes of attributing conduct by one related party to another.¹²² We have then exempted all agreements or arrangements involving only *de facto* affiliates in the subsection 45(4) exemption. Indeed, we have gone further in the exemption by deeming corporations to be affiliated where one has acquired sufficient *securities* or, in the case of a partnership, *profit or dissolution interests* to constitute a "significant interest" in the other.¹²³

In effect, our model would extend the definition of "affiliate" for purposes of section 45 so as to exempt from subsection 45(1) all agreements and arrangements between or among companies, partnerships and other persons that are related on the basis of securities or interests in profits or assets, the acquisition of which was or is subject to regulation under the merger provisions. We therefore would compel the Commissioner to challenge the *acquisition* of such an interest under civil standards, rather than the *exercise* of power conferred by such acquisition under criminal standards.

(3) Ancillary Restraints, Joint Ventures, Etc.

(i) General

45. (4) Subsection (1) does not apply in respect of an agreement or arrangement:

...

(c) or an effect that is ancillary ("ancillary agreement or effect") to another agreement or arrangement ("principal agreement"), including an

United States with *Timken Roller Bearing Co. v. U.S.* (1951), 341 U.S. 593 at 598. See further ABA Section of Antitrust Law, "Chapter IV - Joint Ventures" in *Antitrust Law Developments* (Chicago: Amer. Bar Assoc'n, 1997) at 412-413. In Europe, "[t]he conduct of a subsidiary may be imputed to a parent, at least if the parent has controlled or decisively influenced the activities of the subsidiary." Bellamy & Child, note 44, *supra*, at 49. See also *ibid.* at 320-21; *Gosme/Martell - DMP*, [1992] 5 C.M.L.R. 586 (agreement between X and its 50% owned subsidiary - Z - equally owned by Y).

¹²¹ "Merger" is defined to include "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of [a] significant interest in the whole or a part of a business of a competitor, supplier, customer or other person."

¹²² The inclusion of "*de jure* affiliates" removes the concern that parties might establish corporations to accomplish otherwise unlawful activities in reliance upon the fact that no agreement or arrangement between or among competitors has been affected.

¹²³ See note 121, *supra*.

agreement to acquire or lease assets, that was not entered into for a principal purpose of having an effect set forth in paragraph (1)(a), (b), (c) or (d), where:

- (i) the ancillary agreement or effect is reasonably necessary to give effect to, or an integral part of, the principal agreement; and*
- (ii) it was not reasonably foreseeable, at the time that the principal agreement was entered into, that competition would be substantially lessened or prevented as a result of the ancillary agreement or effect,*

provided, however, that where the predominant purpose of the principal agreement is to achieve gains in efficiency the parties shall be deemed to have not entered into such agreement for a principal purpose of having an effect set forth in paragraph (1)(a), (b), (c) or (d)

An ancillary restraint is a restraint or limitation on competition that is ancillary¹²⁴ to an otherwise lawful or unobjectionable agreement or arrangement. Ancillary restraints frequently arise from an acquisition of assets, such as the shares of a corporation carrying on a business.¹²⁵ Ancillary restraints also frequently arise as a result of joint ventures aimed at research, development or production. Because the ancillary restraint on competition is not the principal *object* of the transaction, there is justification for treating such restraints differently, particularly when they are reasonably necessary to give effect to the principal agreement. For the most part, competition authorities approach ancillary restraints with greater leniency than naked restraints on competition because they recognize that the overall impact of the cooperative venture may enhance competition. For example, a research and development joint venture may lead to the creation of innovative new products, such as drugs, while a production joint venture may result in significant efficiencies and a lower cost product.

Our principal aim in paragraph 45(4)(c) was to categorically remove from the *per se* net all those transactions with unintended, minor, inconsequential or necessary effects on competition,¹²⁶ provided:

- (1) the ancillary agreement is reasonably necessary to give effect to, or an integral part of, the principal agreement; and

¹²⁴ To be viewed as ancillary, clearly the agreement, arrangement or effect must be subordinate in importance to the main object of the transaction. See Bellamy & Child, note 44, *supra*, at 346, ¶6-081.

¹²⁵ Bill C-256 would have provided the following exemption from the conspiracy provision:

[The conspiracy provision] does not apply to or affect the enforceability of a covenant, that is otherwise enforceable as between the parties thereto, by a person who is

- (a) disposing of a business or practice that he will not, for a stated period or in a stated area or both, engage in a like business or practice,
- (b) selling or leasing premises that he will not, for a stated period or in a stated area or both, engage in a business or practice that was previously carried on in such premises, or
- (c) entering into or continuing in employment that he will not, for a stated period or in a stated area or both, following the termination of such employment, engage in a like business or practice to that in which he is so employed,

except where any person entitled to enforce the covenant is in a monopoly position within the meaning of section 41.

We believe that the Draft Code would capture all of the concepts in (a) to (c) and additional ancillary restraints that have a small likelihood of injuring competition.

¹²⁶ Note that the effect on competition must not be a principal purpose of the principal agreement.

- (2) it was not reasonably foreseeable, at the time that the transaction was entered into, that competition would be *substantially* lessened or prevented as a result thereof.

We believe that paragraph 45(4)(c) properly balances concerns about the *inefficient approval* of pro-competitive and competitively neutral joint ventures, acquisitions and other principal agreements with the need for a careful review of agreements and arrangements that are more likely to prove problematic.¹²⁷ Where the exemption is not available for failure of any of these conditions, the parties may still seek a clearance certificate, as discussed below.¹²⁸

(ii) *Ancillary "Agreement," "Arrangement" or "Effect"*

In many instances, there is no ancillary restraint associated with an agreement or arrangement, as such, but rather an ancillary *effect* (i.e., the parties did not intend to affect competition, but their agreement or arrangement did have such an effect). For example, a simple purchase and supply contract, without more, would not ordinarily have at its aim the lessening or prevention of competition. Yet, it may be that the *effect* of a supply contract between competitors is that the buyer eliminates independent, competitive sources of output or production capacity. Given the broad net under subsection 45(1) of the Draft Code that would otherwise trap such effects, it is appropriate to release such agreements from the net, unless the impact on competition was *substantial and reasonably foreseeable*.¹²⁹

(iii) *"Not entered into for a principal purpose of having an effect"*

One must be careful in designing an exemption to remove ancillary restraints from *per se* illegality. For example, assume that:

- in a purchase and sale of a business that operated in Montreal, the *buyer* agrees not to enter and compete with the seller in the Toronto market for a period of time;¹³⁰ or

¹²⁷ We would not attempt to qualify or limit the scope of "principal agreements" that may be entered into in order to benefit from the application of the exemption. In contrast, the *U.S. Competitor Collaboration Guidelines* appear to suggest that the types of principal agreements that may be considered are only those which qualify as "efficiency-enhancing integrations of economic activity." *U.S. Competitor Collaboration Guidelines*, note 36, *supra*, §3.2.

¹²⁸ See Part C.1(b)(5).

¹²⁹ See Appendix 4, Example (5).

¹³⁰ See European Community, "Notice On Restrictions Directly Related and Necessary to Concentrations," found at http://europa.eu.int/comm/competition/oj_extracts/2001_c_188_07_04_0005_0011_en.pdf (accessed on Aug. 7, 2001) at ¶¶ 12, 13 and 17 (hereafter "*European Commission Notice on Ancillary Restraints*");

Non-competition obligations which are imposed on the vendor in the context of the transfer of an undertaking or of part of it can be directly related and necessary to the implementation of the concentration. In order to obtain the full value of the assets transferred, the acquirer must be able to benefit from some protection against competition from the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such non-competition clauses guarantee the transfer to the acquirer of the full value of the assets transferred, which in general include both physical assets and intangible assets, such as the good will accumulated by the vendor or the know-how she/he has developed. These are not only directly related to the concentration, but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the undertaking or of part of it could not be accomplished. [Nevertheless, i]t is the acquirer who needs to be assured that she/he will be able to acquire the full value of the acquired business. Thus, as a general rule, restrictions which benefit the vendor are either not directly related and necessary to the implementation of the concentration at all, or their scope and/or duration need to be more limited than that of clauses which benefit the acquirer. ... [Moreover, t]he acquirer does not need to be protected against competition

- two companies with potential blocking patents that have been obtained in two different countries settle litigation concerning their patent rights by cross-licensing arrangements, which has the effect of leaving one patent holder to compete in one country and the other patent holder to compete in the other country.

These examples illustrate the need to maintain as *per se* illegal those agreements or arrangements whose *purpose* is to affect prices or output or to allocate customers or geographic areas, irrespective of whether the object is achieved through the big print or the fine print.¹³¹

We have drafted paragraph 45(4)(c) to disallow the exemption for ancillary restraints when a principal purpose for the principal agreement or arrangement was to impact on competition. An important consequence of this approach is the avoidance of prolonged litigation as to whether or not the purpose, or the *predominant* purpose, of the principal agreement or arrangement was to impact on competition.¹³² On the other hand, we have also been cognizant to not exclude those agreements and arrangements that clearly have been designed to achieve gains in efficiency. (See Part C.1(b)(3)(vi) below.)

(iv) "Reasonably necessary" or "Integral part"

The ancillary agreement, arrangement or effect must be reasonably necessary to give effect to, or an integral part of, the principal agreement. We cannot imagine circumstances in which an ancillary "effect" would not be considered an integral part of a principal agreement. With respect to ancillary agreements or arrangements, we would anticipate that the interpretation of the phrase "reasonably necessary" would be influenced by American jurisprudence on the subject, where:

An apparently anticompetitive restraint can be redeemed only if reasonably necessary to achieve a legitimate objective. To be reasonably necessary, the restraint must not only promote the legitimate objective but must also do so significantly better than the available less restrictive alternatives. This is a two-part inquiry. Does the restraint actually serve the claimed legitimate objective? Can that objective be achieved as well without restraining competition so much?"¹³³

from the vendor in product or service markets in which the transferred undertaking was not active before the transfer.

¹³¹ See Appendix 4, Examples (6) and (7).

¹³² See, for example, the case law considering whether the low pricing policy of a customer that has been refused supply must be *the only real cause, a major reason or a proximate cause* in order for the Crown to secure a conviction under paragraph 61(1)(b) of the *Competition Act*: See *Competition Law of Canada*, note 16, *supra* citing *R. v. Andico Manufacturing Ltd.* (1983), [unreported] (Man. Q.B.); *R. v. Royal LePage Real Estate Services Ltd.*, [1993] A.J. No. 654.

¹³³ See *Areeda & Hovenkamp*, note 49, *supra*, at ¶1505. See also *Yamaha Motor Co. v. Federal Trade Commission* (1981), 657 F.2d 971, *cert. denied* (1982), 456 U.S. 915, where a joint venture between a Japanese and an American company - potential competitors in the American market - to develop a new line of outboard motors was held to be illegal based, in part, on the restraint imposed upon the Japanese company from independently marketing in the U.S.; Bork, note 27, *supra*, at 265-66: "Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, [are], of course, only ancillary to the main end of the union, and [are] to be encouraged." By "ancillary" [Judge] Taft meant that the agreement was subordinate to the main transaction, the partnership, and contributed to its efficiency. This definition requires that the agreement eliminating competition be no broader than the need it serves."

We have used the words "an integral part of" to ensure that the words "reasonably necessary" are not read so restrictively as to limit the practical utility of the exemption.¹³⁴ Thus, we would hope to ensure that arguments made to the effect that, "but for the restriction, the agreement would not likely have been entered into with the resulting benefits to competition" are unequivocally accepted.¹³⁵

(v) "Not reasonably foreseeable" to Affect Competition

The phrase "reasonably foreseeable" is used extensively in tort law, where it means that which is objectively reasonable to expect to occur, not what might conceivably occur. As stated by the Supreme Court of Canada:

The law does not require a prudent man to foresee everything possible that might happen. Caution must be exercised against a danger if such danger is sufficiently probable so that it would be included in the category of contingencies normally to be foreseen. To require more and contend that a prudent man must foresee any possibility, however vague it may be, would render impossible any practical activity.¹³⁶

The phrase "direct, substantial and reasonably foreseeable effect" is also used in the *Foreign Trade Antitrust Improvements Act of 1982*.¹³⁷

(vi) "Where predominant purpose" "Gains in efficiency"

Often competitors collaborate for the principal or predominant reason of achieving gains in efficiency,¹³⁸ but recognize that ancillary restraints on competition may prove useful in avoiding

¹³⁴ For example, a commitment by participants to a joint venture that they will not, during the term thereof, compete with the joint venture may not, strictly speaking, be necessary to form the joint venture. We would anticipate that a Canadian tribunal would find the restraint to be *reasonably necessary*, but believe there would be no doubt that the restraint was an integral part of the joint venture. See Appendix 4, Examples (8) and (9).

¹³⁵ See Bellamy & Child, note 44, *supra*, at 165-66: "The Commission has sometimes held that without the restriction in question - for example an exclusivity provision - the agreement would never have been entered into in the first place, and the benefits of the agreement never achieved [And, g]enerally speaking, a provision which secures the main purpose of the agreement will be regarded as indispensable. For example, a requirement not to sell outside the system is indispensable to a system of selective distribution, a restriction on exhibiting at other trade fairs is indispensable to securing the rationalisation of such fairs, an obligation to close capacity is indispensable to a restructuring agreement and an agreement not to compete with a joint venture is generally indispensable to securing the benefit of the joint venture in question."; *European Commission Notice on Ancillary Restraints*, note 130, *supra*, at ¶ 9, where the European Commission requires that an ancillary restraint be "necessary to the implementation of the concentration," which means that in the absence of those agreements, the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably higher difficulty. Agreements aimed at protecting the value transferred, maintaining the continuity of supply after the break-up of a former economic entity, or enabling the start-up of a new entity, usually meet these criteria."; *European Commission Notice on Cooperative Joint Ventures*, note 64, *supra*, ¶¶ 65-76. See also *U.S. Competitor Collaboration Guidelines* at 9: "An agreement may be 'reasonably necessary' without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary." See also *ibid.*, at 28 ("Example 2").

¹³⁶ *Wade v. Canadian National Railway Co.*, (1977), 80 D.L.R. (3d) 214 at 231, citing *Ouellet v. Cloutier*, [1947] S.C.R. 521.

¹³⁷ 15 U.S.C.A. §6a and §45(a)(3); Holmes, note 37, *supra*, at 782. See Appendix 4, Example (10).

¹³⁸ See *SCFC ILC, Inc. v. Visa USA, Inc.* (1994), 365 F.3d 958 at 963 (10th Cir.), *cert. denied* (1995), 115 S.Ct. 2600: "[E]fficiencies created by joint ventures are similar to those resulting from mergers - risk sharing, economies of scale, access to complementary resources and the elimination of duplication and waste." Risk

*intra-JV competition.*¹³⁹ Since the proposed ancillary restraint defence would not exempt agreements or arrangements that have a principal purpose of affecting competition in one of the prescribed manners, it was felt important to remove the potential chilling effect of those words by lending comfort to cooperative efforts formed for the *predominant* purpose of gains in efficiency.¹⁴⁰ Where paragraph 45(4)(c) would not exempt an agreement or arrangement from subsection 45(1) of the Draft Code because the *predominant* purpose of the transaction is, or may be, to lessen or prevent competition, a party to the agreement or arrangement may nevertheless seek and obtain a clearance certificate. (See Part C.1(b)(5) below.)

(4) Mergers and Asset Acquisitions

45. (4) Subsection (1) does not apply in respect of an agreement or arrangement:

...

(d) pursuant to which assets, including shares, will be acquired only, where the purpose of the agreement or arrangement is not to affect a market in any manner contemplated in paragraphs (1)(a) or (b).

(7) For purposes of paragraph (4)(d), where the consideration for assets that are the subject of an agreement or arrangement does not substantially exceed the fair market value of such assets, in the aggregate, the parties shall be deemed, in the absence of evidence to the contrary, to have not entered into such agreement or arrangement for the purpose of affecting a market in any manner contemplated in paragraphs (1)(a) or (b).

The history of section 45 would support the proposition that "mergers" can be conspiracies, and *vice versa*.¹⁴¹ American and European law is no different.¹⁴² Nevertheless, mergers that involve the

sharing can lower the overall risk of a project, resulting in access to lower costs of capital and, consequently, lower production costs. This may result where two companies with different skill sets or other strengths combine to create a new product; the chances of success may be much higher than if such companies were to pursue the matter independently. See also *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra*, at ¶ 32: "Most efficiencies [in joint ventures] stem from the combination of different skills or resources." See further S.A. Johnson and M.B. Houston, "A Reexamination of the Motives and Gains in Joint Ventures" (2000), 35 J.F.Q.A., No. 1 at 67.

¹³⁹ See Appendix 4, Example (11).

¹⁴⁰ No doubt, there will be those collaborative efforts that fail to achieve the gains in efficiency that were sought, and those that achieve gains that are outweighed by the anti-competitive effects, but we do not wish to establish a process that assesses those impacts for the reasons outlined in Part B of this report. The analysis, whether it be a consumers' surplus, total surplus or social welfare approach, is fraught with uncertainty, delay and expense, none of which are conducive to the efficiency of business. (For a brief explanation of these concepts, see Crampton & Kissack, note 15, *supra*.)

¹⁴¹ See *Eddy Match Co. Ltd. v. The Queen* (1953), 109 C.C.C. 1 (Que. C.A.); *Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425; Director of Investigation and Research, *Combines Investigation Act, Annual Report for the Year Ended March 31, 1956* (Ottawa: Ministry of Supply and Services, 1956) at 36 ("[Fifteen Year] Management Contract between Canadian National Railways and Hilton of Canada Limited."). The *Competition Act*, itself, acknowledges this possibility in sections 45.1 and 98(a).

¹⁴² *Northern Sec. Co. v. U.S.* (1904), 193 U.S. 197; Bellamy & Child, note 44, *supra*, at ¶6-158. See further *U.S. Competitor Collaboration Guidelines*, note 36, *supra*, at 5 and n. 10: "The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines* if appropriate, which ordinarily is when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms. ... In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger." See also *U.S. Competitor Collaboration Guidelines*, note 36, *supra*, at 28 ("Example 1.3"). See also note 192, *infra*.

potential for operational integration, such as acquisitions of assets (including shares) have long been viewed quite differently than classic cartels.¹⁴³

Both internal growth and horizontal merger[s] eliminate rivalry, and they do so more permanently than do cartel agreements. Prices are fixed and markets allocated within firms. The reason we do not make these eliminations of rivalry illegal *per se* is that they involve integration of productive activities and therefore have the capacity to create efficiency.¹⁴⁴

We would, in effect, exempt "bald" or "naked" acquisitions of assets (including shares) from the *per se* conspiracy net, which do not have the purpose of affecting competition.¹⁴⁵

There are two important components to the proposed exemption:

- First, those asset agreements that have the purpose of fixing, stabilizing or otherwise affecting prices in or of a market, or the purpose of eliminating or restricting capacity, output or supply in, of or to a market, *would not be exempt*; and
- Second, those asset acquisitions that have the purpose of impeding expansion or entry in, of or into a market, or the purpose of allocating, ceasing to supply or purchase, or otherwise affecting relations with one or more customers in, or suppliers to, a market, *would not be ineligible* for exemption.

With respect to the first point, where an acquisition of assets merely serves to justify the payment of a fee that masks compensation for an agreement or arrangement aimed at eliminating output and raising prices, we fail to see why the form of the transaction should preclude the matter from being treated as a "hard core" cartel.¹⁴⁶ Usually, such agreements, though rare, would be detectable based

¹⁴³ See Bork, note 27, *supra*, at 264-69; S. Peltzman, "The Gains and Losses from Industrial Concentration," [1977] J. Law & Econ. 229 at 236 and 257; Hovenkamp, note 23, *supra*, at 88-91: "[C]artels are almost never able to operate as efficiently as single-firm monopolists. First of all, the cartel must sustain the significant transaction costs of bargaining, coordinating activities, and investigating and punishing cheating among its own members. ... Cartels also have far less flexibility than monopolists in coordinating overall production. For example, the monopolist who has five plants and wishes to cut production to 80% of capacity has the option of closing the least efficient plant and running the other four at optimal capacity. As a practical matter a cartel of five firms, each having one plant, does not have that option."

¹⁴⁴ Bork, note 27, *supra*, at 264.

¹⁴⁵ A stark example of the operation of the exemption would be the acquisition by a competitor of another's customer list and associated receivables and sales contracts. There is little justification in treating such a transaction criminally, however, since clearly (i) the seller is evidencing its intent to exit the business and (ii) the buyer is making an acquisition to grow its business. Were the buyer to acquire only a *portion* of the seller's customer list, the exemption likely would not apply, as it would be difficult for the competitors to demonstrate an absence of an intention to allocate customers; any such intention would carry with it the implicit ancillary restraint not to compete with the buyer for such customers, which would render the transaction more than an acquisition of assets only. See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1967* (Ottawa: Ministry of Supply and Services, 1967) at 41 ("Merger Proposal E").

¹⁴⁶ For example, assume that two competitors with multiple plants decide that a local market does not justify their combined presence. One of the participants agrees to withdraw from the market in consideration of a payment. The lawyers then mask the fee within an agreement of purchase and sale. It may be appropriate to treat such matters criminally. See Director of Investigation and Research, Bureau of Competition Policy, *Annual Report for the Year Ended March 31, 1987* (Ottawa: Ministry of Supply and Services, 1987) at 46: "The [criminal inquiry under the conspiracy provision] centred on the circumstances surrounding the purchase by Ultramar Canada Inc. in December 1985 of the former Gulf Canada refinery located in Montreal and on the subsequent closure of the refinery. ... [T]he Director concluded that the evidence ... did not disclose an offence...."; Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1971* (Ottawa: Ministry of Supply and Services, 1971) at 50 ("Construction Material") ("These two companies proposed to rationalize their production facilities ... by closing a plant in each city and creating a

on the discrepancy between the fair market value of the assets acquired (old plants, etc.) and the purchase price paid by the acquirer. Thus, in the absence of a significant discrepancy between such values, we would provide for a presumption that a "naked" acquisition was made without such an intention. The fact that a discrepancy existed would not suggest a "hard core" cartel, but would leave open the ability of the Commissioner to refer the matter for prosecution if the facts warranted such an approach.¹⁴⁷

With respect to the second point, all mergers or acquisitions of businesses have the effect and purpose of allocating customers and suppliers to the buyer. Further, any acquisition that impedes expansion or entry into a market will likely do so only indirectly, such as the acquisition of a strategic stockpile, and ought to more properly be addressed under sections 79 or 92 of the *Competition Act*. For these reasons, we would unequivocally exempt acquisitions of assets having any such effect, provided the transaction does not impose ancillary restraints on competition (i.e., they are acquisitions of assets *only*¹⁴⁸). We would note that nothing would preclude the parties from relying upon the ancillary restraint exemption or applying for a clearance certificate where the "asset only" exemption was unavailable.

third company to acquire their remaining production facilities."); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1968* (Ottawa: Ministry of Supply and Services, 1968) at 51 ("Proposal B") ("One of the[proposals] was the joint purchase of the least efficient of the four major national producers by its competitors, with the intention of subsequently dismantling and closing its two plants."); Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1957* (Ottawa: Ministry of Supply and Services, 1957) at 9: "For almost two years, in 1938 and 1939, the member companies shared the cost of an arrangement whereby one of the companies (the Gair company) kept its Dominion Mill in Toronto inactive."; Commissioner, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1939* (Ottawa: Ministry of Supply and Services, 1939) at 6: "The fiberboard box equipment of Building Products, Limited, at Portneuf, P.Q., was purchased by the combination for about \$86,000, and was sold at auction to its members." We would expect the Commissioner to proceed under civil law to redress situations in which the seller ceased to compete in the relevant market and obtained no benefit from an acquisition aimed at - for example - the shut down of a plant. See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1967* (Ottawa: Ministry of Supply and Services, 1967) at 40 ("Merger Proposal D"); Registrar, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1926* (Ottawa: Ministry of Supply and Services, 1926) at 10 ("Alleged Combine of Break Bakeries in Montreal").

¹⁴⁷ The exemption would not exempt structural conspiracies, meaning conspiracies in which the parties achieve market effects through the structural integration of marketing or other operational functions, such as the formation of a marketing corporation, as in the *Container Materials* case, note 12, *supra*, nor to joint ventures effected through the formation of a corporation. Such transactions do not involve the acquisition of shares only. See *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra*, at ¶ 39. We note that the *Competition Act* presently has no exemption for "naked" acquisitions whatsoever. See *Competition Act*, ss. 45.1 and 98(a). See Appendix 4, Example (12).

¹⁴⁸ An acquisition of a business made jointly by two competitors ordinarily would not benefit from the exemption, since it would involve an agreement between those competitors as to how the acquisition was to be effected and likely an understanding as to how the assets would be dealt with post-acquisition. Nevertheless, in most cases, we would anticipate the Commissioner reviewing the transaction under the civil, merger law standard. In Europe, joint or consortium bids made by two parties are reviewed under the merger regulation, rather than Article 81, where the object and effect is to divide the assets of the target between the acquiring companies immediately after the acquisition. See Bellamy and Child, note 44, *supra*, at 314 ¶6-017; *GEC-Siemens / Plessey*, [1990] O.J. C239/2.

(5) *Clearances*

46. (1) Any person that is, or may become, a party to a proposed or completed agreement or arrangement may apply to the Commissioner for a certificate that the agreement or arrangement is exempt from subsection 45(1) and, if issued, such agreement or arrangement shall be exempt from the application thereof.

(2) A certificate under subsection (1) may be issued:

- (a) with or without an expiry date and, if issued with an expiry date, the applicable agreement or arrangement shall no longer be exempt from subsection 45(1) subsequent to the expiry date, unless a further certificate is obtained under subsection (1);
- (b) subject to certain conditions, including the condition that the agreement or arrangement be modified prior to it being entered into or within a certain period of time, in which event the agreement or arrangement shall only be exempt from subsection 45(1) if such condition or conditions are met.

(3) Where an application is made under subsection (1) prior to the agreement or arrangement being entered into or having effect, the Commissioner shall respond within 60 days, failing which the certificate shall be deemed to have been granted.

(4) Where the Commissioner refuses to grant a certificate under subsection (1) or grants the certificate subject to an expiry date or one or more conditions:

- (a) the applicant may apply to the Tribunal for a hearing of the matter, if the agreement or arrangement is proposed; and
- (b) the applicant may not apply to the Tribunal for a hearing of the matter, if the agreement or arrangement is completed;

and where the applicant may not apply to the Tribunal for a hearing of the matter the decision of the Commissioner is final and not subject to review.

(5) Upon a hearing of the matter under paragraph (4)(a), the Tribunal shall consider whether or not the proposed agreement or arrangement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any likely prevention or lessening of competition that will result from the proposed agreement or arrangement and may make such order as it deems fit.

(6) The Commissioner may exempt from subsection 45(1) any class of agreement or arrangement as the Commissioner deems appropriate and, if issued, any agreement or arrangement falling within such class shall be exempt from the application thereof.

(7) Notwithstanding subsection (1), where the applicant has failed to disclose material facts or otherwise misled the Commissioner in any material respect, a certificate issued thereunder shall be void and of no effect.

One of the difficulties in formulating a *per se* category of offence is the potential for capturing conduct that was not contemplated or wanted. Given the myriad of ways in which, *inter alia*, prices can be affected, supply can be restricted, expansion can be impeded and relations with customers or suppliers can be affected as a result of agreements and arrangements between or among competitors, it is essential that the Commissioner be given the ability to consider, on a case-by-case basis, those transactions that ought to be exempt from the *per se* net.

The ability to seek pre-clearance for a variety of transactions raising *prima facie* antitrust or competition law concerns is not new. Both the European Community and the United States, as well as Australia and New Zealand, make use of such procedures in different ways. In the EC, there is a notification process for case-by-case exemption requests, as well as block exemptions, while the United States permits exemptions in limited cases, such as certain export consortiums¹⁴⁹ and joint ventures.¹⁵⁰ In Australia, a clearance system similar to the one proposed in the Draft Code exists,¹⁵¹ which was introduced in the *Trade Practices Act 1974* and attracted considerable comment from industry at the time:

Industry was apprehensive and claimed that it would be 'the end of the world' as they knew it. To a large degree they were right. The 1974 Act posed an even greater threat to the myriad of inter-locking anti-competitive agreements that had existed in the Australian economy since the Depression The initial response by business to the 1974 Act was to lodge some 20,000 applications for authorisation.¹⁵²

Nevertheless, after the initial flood of clearance requests, the process improved and Chairman Fels, at least, feels that the law "is very good, it is flexible for a small economy and in this regard the authorisation process is important."¹⁵³

We believe that a clearance process would work well in Canada, provided the following principles were adhered to:

¹⁴⁹ See *Export Trading Company Act of 1982*, 15 U.S.C.A. §§ 4001-4021; *Webb-Pomerene Act*, 15 U.S.C.A. §§ 61-66.

¹⁵⁰ See *The National Cooperative Research and Production Act of 1993*, 15 U.S.C.A. §§ 4301-4305, which entitles any party to a joint venture to file with the Attorney General and the Federal Trade Commission the details of a joint venture falling within the statute and such notice entitles the joint venture participants to certain protections under the statute.

¹⁵¹ A. Fels, AO, "Competition Policy: Governance Issues - What are the Alternative Structures? Australia's Experience" (Address to the Canadian Competition Policy Conference, 20 June 2001) [unpublished] at 5: "Administrative Exemptions: Unlike in Canada, the TPA allows the ACCC to 'authorise' proscribed conduct (other than misuse of market power) on a case-by-case basis, where the public benefits of such conduct outweigh the associated anticompetitive detriment. Parties gaining authorization are granted immunity from legal proceedings under the TPA in relation to the authorised conduct. Authorisation is a practice ... granted in few cases where the result is a significant lessening of competition."

¹⁵² A. Fels, *ibid.*, at 11: "To some extent the new TPC encouraged business to lodge applications for authorisations by indicating that anyone who lodged by February 1975 would be given automatic interim authorisation."

¹⁵³ A. Fels, *ibid.*, at 19. We readily acknowledge the concerns that exist in Europe with regard to their exemption process. See *White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty* (1999), found at http://europa.eu.int/comm/competition/antitrust/wb_modernisation_en.pdf (accessed on Aug. 7, 2001) (hereafter "European White Paper"). Nevertheless, careful review of the European situation demonstrates that there are reasons as to why the clearance process has become problematic, including the scope of agreements and practices (both horizontal and vertical) that are potentially caught in the Article 81 net, the incentives that encourage companies to notify for strategic reasons (e.g., to block private action before national courts and national competition authorities), the number of languages (11) in which the European Community must operate, the requirement that decisions be fully reasoned and published (in 11 languages), the continued expansion of the European Community and a variety of other factors. Fundamentally, the fact that all agreements conflicting with Article 81(1) are void by virtue of Article 81(2) (at least insofar as they are unlawfully restrictive) has also heightened the significance of the clearance process in Europe, induced companies to notify large numbers of agreements not having serious competitive implications and ensured that any delay in a clearance request will almost certainly have an effect on the commercial activities of the parties to the agreement. It is not surprising in such a context that clearance delays have been experienced and complaints abound. In Australia, authorizations are also available for a broader class of transactions, which include certain types of vertical restraints of trade. See generally R. Jones, Commissioner, Australian Competition and Consumer Commission, "Dealing with Horizontal Restraints: The Australian Competition and Consumer Commission's Perspective" (April 17, 2000), found at <http://www.accc.gov.au/speeches/fs-speeches.htm>.

- (1) *Timing of Notification*: The right to seek clearance certificates for agreements and arrangements at any period of time, including post-execution or implementation;
- (2) *Flexibility in Approving Modified Agreements*: The ability to seek guidance from the Commissioner as to how the agreement or arrangement might be modified to eliminate concerns about its effect;
- (3) *Timing of Clearance Response*: The right to receive a response within a limited period of time;
- (4) *Factors to be Considered*: The ability of the Commissioner and Tribunal to consider the net overall effect of the transaction on the economy, including efficiencies and pro-competitive results;
- (5) *Appeal*: The right to have a full hearing before an impartial tribunal on proposed agreements or arrangements that are not approved by the Commissioner;
- (6) *Costs*: The cost of the exemption application ought to be sufficient in size as to discourage perfunctory notifications, yet not so large as to impede or discourage transactions;
- (7) *Effect*: The issuance of a certificate ought to exempt parties from both criminal and civil liability; and
- (8) *Confidentiality*: The obligation of the Commissioner and his or her staff to maintain in confidence both the fact of a notification and all materials provided in support of a certificate request.¹⁵⁴

We will examine each of these principles in turn.

Timing of Notification: It is not a novel concept to permit exemption requests in respect of cooperative agreements or arrangements post-execution or post-implementation.¹⁵⁵ Our reasoning in recommending such an approach is as follows: First, those agreements and arrangements that ought to be cleared will be cleared, and *vice versa*, regardless of when the matter comes before the Commissioner, provided the Commissioner has jurisdiction to act. Second, parties that have entered into a potentially problematic transaction often obtain competition law advice months or years after entering into the agreement or arrangement and we do not see any compelling reason to discriminate against such persons.¹⁵⁶ Finally, encouraging the notification of problematic

¹⁵⁴ We would amend section 29 of the *Competition Act* to address this issue. See Part C.2(c).

¹⁵⁵ See Bellamy & Child, note 44, *supra*, at 684: "A new agreement can always be notified after the agreement has come into effect, but it does not obtain any of the benefits of notification during any period before it was notified. ... It is not clear whether an agreement can be notified after its expiry."; *National Cooperative Research and Production Act of 1993*, 15 U.S.C.A. §§4301-4305 at §4305, which entitles any party to certain types of joint ventures to seek certain protections under the antitrust laws where they file before or within 90 days after the venture has become effective.

¹⁵⁶ An example of a circumstance in which post-execution or post-implementation notification of an agreement or arrangement would be useful is where there has been a transaction involving a change in control of a party to such an agreement or arrangement (such as by means of a take-over bid) and new counsel review the agreement or arrangement with "fresh eyes." Similarly, a proposed assignee to such an agreement may feel quite differently about the need to seek a clearance certificate. In this regard, we would enable any party to the proposed agreement or arrangement to seek a clearance certificate and anticipate the Commissioner establishing rules concerning the proper notification of other parties to the agreement or arrangement in such circumstances.

agreements and arrangements undoubtedly would assist the Commissioner in taking action to void them or, at least, cause them to cease operating to the detriment of the Canadian economy.¹⁵⁷

Flexibility in Approving Modified Agreements: Clearly, it is important to encourage the Commissioner to actively cooperate with those who seek an exemption for an agreement or arrangement that is fundamentally pro-competitive and (i) would be rejected, if not amended, and (ii) can easily be amended in order to address competition concerns.¹⁵⁸ We have inserted paragraphs 46(2)(a) and (b) in our Draft Code to ensure that the Commissioner has the necessary jurisdiction to approve such agreements and arrangements.¹⁵⁹ With respect to the duration of a certificate, we would anticipate that most certificates would have no expiry date. Nevertheless, there are circumstances where an expiry date might enable the issuance of a certificate that otherwise would be refused.¹⁶⁰

Timing of Clearance Response: One of the major weaknesses in the European process is the time lag between a notification and a formal response, which can extend over a two-year period.¹⁶¹ We have attempted to address this concern by requiring the Commissioner to respond within a 60 day period, failing which the agreement or arrangement is deemed to be approved.¹⁶² Since our model

¹⁵⁷ We assume that the Commissioner would continue, albeit modify, existing incentives to encourage notification of operating or ongoing agreements and arrangements, such as through immunity policies. See Competition Bureau, *Immunity Program Under the Competition Act*, found at www.strategis.ic.gc.ca/SSG/ct/immunitye.pdf (accessed Aug. 7, 2001). Note that many conspiracy prosecutions have resulted from the parties to an agreement communicating with an arm of the Federal Government, including the Competition Bureau and its predecessors. See, for example, *Beckett*, note 12, *supra*; *PANS*, note 12, *supra*; *R. v. Burrows* (1966), 54 C.P.R. 95 (B.C.S.C.).

¹⁵⁸ The Commissioner (and the Director of Investigation and Research before him) has demonstrated the willingness and ability to negotiate amendments to proposed transactions to ensure that the pro-competitive, efficiency-enhancing aspects of the transactions were realized without harmful effects resulting to the economy.

¹⁵⁹ The European Community notification process is clearly a useful reference point in this regard. It also features time-limited and conditional approvals, both of which are frequently used to ameliorate concerns that the Commission might otherwise have with respect to a particular agreement or arrangement. See Bellamy & Child, note 44, *supra*, at 146: "[T]he Commission has power to grant [an] exemption which is limited to a specified period; in addition, it has power to attach conditions and obligations to the exemption" In many cases, these modifications have neutralized the concerns of the Commission with regard to the potential harmful effects of the transaction on competition and enabled efficiencies to be realized by the parties. For example, in *Ford / Volkswagen*, O.J. 1993 L20/14, the Commissioner approved a joint venture between Ford and Volkswagen aimed at developing and producing a new vehicle within a discrete product market. The market was small, required significant capital to enter and there was no assurance that either Ford or Volkswagen, acting alone, would achieve sufficient sales to break-even. The exemption was conditional upon, *inter alia*, the establishment of appropriate "chinese walls" to ensure that certain types of information were not exchanged between the two car manufacturers. See, similarly, *Accord*, *General Motors Corp.*, 103 F.T.C. 374, in which General Motors and Toyota obtained approval to jointly construct a car manufacturing plant in California, provided they continued to separately operate their existing businesses. In the United States, the Federal Trade Commission has authority to investigate the activities of associations claiming *Webb-Pomerene* status and to make recommendations for their reform. See also *Competition Act*, ss. 86(1) and (4), which permits the Competition Tribunal to make an order that a specialization agreement be registered "for a period specified in the order" or on certain conditions being satisfied.

¹⁶⁰ For such an example, see *U.S. Competitor Collaboration Guidelines*, note 36, *supra*, at 29 ("Example 3"). We note that Bill C-472, s. 7, would have rendered any certificate issued thereunder valid for a period of 3 years only. We fail to see why such a restriction would be imposed and would argue that it would defeat the efficiency of the certificate process.

¹⁶¹ See Bellamy & Child, note 44, *supra*, at 684.

¹⁶² The Commissioner might use his ability to deny a clearance certificate for the purpose of negotiating additional time, although the agreement of the parties would have to be sought. Were the Commissioner simply to deny the certificate in circumstances where he had all relevant information to assess the transaction, but lacked sufficient time to complete the assessment, the Commissioner would face potential cost awards on an appeal to the Tribunal.

would enable exemption requests to be made in respect of completed agreements and arrangements, there would be the potential for an initial surge of exemption requests. Nevertheless, we would anticipate that the Commissioner would obtain the necessary resources to address the profoundly more active role of the Competition Bureau in short order.¹⁶³ Moreover, the proposed exemption for ancillary restraints and effects ought to remove a number of potentially problematic agreements and arrangements from the queue.

Factors to be Considered: We have avoided the inclusion of factors that the Commissioner ought to consider when exercising his or her discretion under section 46 of the Draft Code, such as those found in section 93 of the *Competition Act*.¹⁶⁴ Nevertheless, we believe that the Commissioner would be influenced by the factors to be considered by the Tribunal on appeal; namely, "whether or not the proposed agreement or arrangement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any likely prevention or lessening of competition that will result from the proposed agreement or arrangement."¹⁶⁵

Appeal: There will be certain types of agreements and arrangements that fall within subsection 45(1), such as *Ford / Volkswagen*,¹⁶⁶ which amount to virtual mini-mergers of sorts.¹⁶⁷ The approval of such transactions may be quite important to the Canadian economy and justify a full hearing of the matter, where an exemption has been denied by the Commissioner, in whole or in

¹⁶³ Note, however, that the deeming provision would only apply to *proposed* agreements and arrangements and, as such, the Commissioner could delay the consideration of completed agreements and arrangements in the initial surge of applications.

¹⁶⁴ In Europe, Article 81(3) reads: "The provisions of paragraph 1 may, however, be declared inapplicable in the case of;

- any agreement or category of agreements between undertakings;
- any agreement or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

As such, Article 81(3) compels the Commission to consider whether an agreement or arrangement may contribute to (i) an improvement in the production of goods, (ii) an improvement in the distribution of goods, (iii) technical progress, or (iv) economic progress. Such factors are rather general in nature, as in the case of section 1.1 of the *Competition Act*.

¹⁶⁵ Undoubtedly, the Commissioner would also be influenced by section 1.1 of the *Competition Act*, which reads: "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices." It should be noted that we would not compel the Tribunal to issue a clearance certificate where the gains in efficiency outweighed the negative competitive effects for two reasons: First, the *Competition Act* itself does not reflect the predominance of efficiency gains as a policy objective, section 96 being an exception (and those other policy objectives being described in section 1.1 of the *Act*); and, second, we believe that the Tribunal is a proper place to balance those competing objectives, which is more easily assured in the absence of rigid tests that tend to attract appeals.

¹⁶⁶ See note 159, *supra*.

¹⁶⁷ Indeed, it may be that the *Ford / Volkswagen* joint venture would constitute a "merger" under existing Canadian law. See note 121, *supra*.

part.¹⁶⁸ The cost of litigation before the Tribunal is so significant¹⁶⁹ that only errors on the part of the Commissioner with regard to agreements and arrangements of significant economic consequence are likely to be appealed.¹⁷⁰

Costs: While not explicitly part of the Draft Code, we believe that fees are necessary grease in the wheels of the Draft Code clearance system. In other words, we believe that fees *need* to be charged, as in the case of advance ruling certificates made pursuant to section 102 of the *Competition Act*, in order to ensure that the wheels of the clearance mill do not become clogged.¹⁷¹ Assuming conservative, prudent advice, and risk adverse clients, we would anticipate that the class of agreements and arrangements that *justify* notification and an exemption request (and therefore can be made the subject of criticism) are those that:

- involve actual or *possible* competitors;
- would or *could* affect prices, capacity, output, supply, expansion, entry, customers or suppliers in some way;
- do not involve a mere acquisition of assets, including shares;
- cannot benefit from the ancillary restraints exemption because they:
 - (i) have been entered into for the purpose of affecting competition *or the purpose is somewhat ambiguous* (and it is clearly not one that has been entered into with the predominant purpose of achieving efficiencies);
 - (ii) have ancillary restraints or effects that are not *inherently* necessary to achieve the larger transaction; or
 - (iii) will or may impact on competition in a *material* way.
- do not *clearly* fall within a block exemption;¹⁷² and

¹⁶⁸ A denial in part refers to a conditional or time-limited exemption under the Draft Code.

¹⁶⁹ Based on our experience and discussions with other competition counsel, we do not believe that it is possible to incur costs of less than \$1,000,000 in normal, contested merger proceedings before the Tribunal. Indeed, we believe this has been one of the principal reasons for the failure of the specialization agreement provisions. See Part C.2(b).

¹⁷⁰ We would not permit appeals to be taken by aggrieved third parties with respect to the issuance of a certificate, as may be done in Europe. See Bellamy & Child, note 44, *supra*, at 148 and 784.

¹⁷¹ In our view, the size of the fee for a clearance certificate should take two things into account: First, a minimum fee that is necessary to discourage perfunctory notifications made in economic substitution for legal advice and, second, the aggregate size of the parties to the transaction. We would anticipate a minimum fee of \$10,000 for a clearance certificate, rising to perhaps \$25,000 for parties exceeding a certain aggregate size, such as those with aggregate revenues in excess of \$1 billion. Assuming 50 notifications per year at the \$10,000 level and a further 20 at the \$25,000 level, the Bureau would receive additional funding of \$1,000,000 per year to address the Competition Bureau's increased requirements for administrative personnel. It might also be appropriate to charge an additional fee for *negative clearances* where counsel notify transactions that *clearly* do not fall within subsection 45(1) of the Draft Code or *clearly* fall within a block exemption. We would anticipate a further *de minimus* block exemption that would apply to agreements or arrangements that: (i) had not been entered into for the purpose of affecting competition; and (ii) do not involve parties with aggregate revenues or assets in excess of - for example - \$25,000,000. Such an exemption would help avoid hardship caused by the clearance fee and would be unlikely to let "loose" many transactions that would cause significant damage to the Canadian economy.

¹⁷² See notes 55, 56 and 171, *supra*.

- involve market shares in an affected market, or arguably an affected market, in excess of a *de minimus* level.¹⁷³

We believe that our model "weeds out" the vast majority of non-problematic transactions and leaves in the basket of concern only those agreements and arrangements that would justify the Commissioner's time and energy.

Effect: The issuance of a clearance certificate should operate as a complete shield to criminal proceedings under subsection 45(1) of the Draft Code, whether pertaining to the period of time before an application is made or a certificate is issued or after such application or issuance. In balancing the interests of a civil litigant under section 36 with the rights of a certificate holder, we would envision the certificate providing further protection with respect to private actions under section 36, as follows: (i) with respect to civil actions brought against agreements or arrangements that were notified when *proposed*, a clearance certificate would bar such action altogether; and (ii) with respect to civil actions brought against agreements or arrangements that were notified after they were *completed*, a clearance certificate would only operate to preclude damages after the date of notification.¹⁷⁴

Confidentiality: We would contemplate the confidentiality provision of the *Competition Act* (i.e., section 29) being expanded to cover all information provided to the Commissioner in respect of a clearance certificate request. In certain circumstances, the Commissioner might require disclosure and feedback from interested parties prior to granting an exception certificate. Nevertheless, it would be within the power of the parties in such circumstances to agree to such disclosure, failing which they might be forced to abandon their request for an exemption.¹⁷⁵

The ability of the Commissioner to develop block exemptions is essential to the efficiency of the Draft Code, as well as the development of a sophisticated competition law regime in Canada. In the area of conspiracy law, Canada has fallen far behind both the United States and Europe in the level of guidance that is available to business: Canada does not have the benefit of over 100 years of jurisprudence in a highly litigious environment, as exists in the United States, nor over nearly 50 years of jurisprudence in an environment featuring a clearance system with a long list of detailed and useful block exemptions and notices, as exists in Europe.¹⁷⁶

(6) Other

The Draft Code would eliminate the export exemption, which was inserted into the *Combines Investigation Act* in 1960. Some have argued that it is desirable to continue the export cartel defence as a matter of public policy, since exports are to be encouraged, particularly in an export oriented country such as Canada.¹⁷⁷ We would argue to the contrary for a number of reasons: first,

¹⁷³ See note 56, *supra*. We would anticipate that counsel would exercise caution in defining the market (either larger or smaller to reflect the highest concentration realistically possible in the circumstances), but use the market share safe harbours in a rather straightforward way once the market share had been conservatively determined.

¹⁷⁴ The wording of a provision to give effect to our recommendation is beyond the scope of this report.

¹⁷⁵ In Europe, there is no public register of notified agreements, however, 'formal' comfort letters and decisions are published in the *Official Journal* and third parties are invited to respond with comments.

¹⁷⁶ See *European White Paper*, note 153, *supra*, at 4: "This centralised authorisation system was necessary and proved very effective for the establishment of a 'culture of competition' in Europe." In Canada, the Commissioner has issued a series of bulletins or guidelines on a variety of different subjects, but often the guidelines have been rather vague, failed to provide any concrete safe harbours and – in one case – was not even followed by the Commissioner in litigation proceedings. See *The Commissioner of Competition v. Superior Propane Inc.*, [2000] Comp. Trib. 15 (hereafter "*Propane*").

¹⁷⁷ J. Chipman, "Chapter 8 – Globalization and the Conspiracy Provisions" in R.S. Khemani & W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy

the world has evolved and the corners of the globe where cartels that have a substantial effect on competition are permissible are becoming fewer and fewer and of lesser and lesser importance;¹⁷⁸ second, the continued existence of the export cartel defence suggests that Canadian business might be protected from prosecution in foreign jurisdictions, when this is not the case;¹⁷⁹ third, to the extent that there is no material impact on competition in Canada, Canadian businesses would be free to seek a clearance certificate for the agreement or arrangement under the Draft Code and thereby achieve the efficiencies that might otherwise be lost from the denial of such cooperative efforts.¹⁸⁰

We have not attempted to codify or alter the apparently existing defence for regulated conduct, which we believe would continue to operate under the Draft Code. The defence operates where the conduct in question is validly regulated and either compelled or authorized by regulation.¹⁸¹ Further, we have not considered those exemptions applicable to labour, fishermen, securities underwriters, professional sports or Crown agencies.¹⁸²

1991) 195 at 203. We note that the exemption was broadened in 1986 by enabling exports to reduce or limit the volume of exports, so long as their real value was not reduced. In other words, export volumes could be reduced, provided the net effect was an increase in the value of exported products. The exemption was also amended to delete a restriction that prohibited parties from relying upon the exemption where the agreement between exporters had the effect of unduly lessening or preventing competition in Canada. At the time of the foregoing legislative changes, the Minister of Consumer and Corporate Affairs stated in her "Background Information and Explanatory Notes" that:

Exports are of particular significance to the Canadian economy. They account for some 30 percent of our GNP. Reflecting this fact, since 1960 the *Combines Investigation Act* has provided a specific exemption for export agreements. ... [The amendments] will make the export exemption more useful to firms combining their efforts to penetrate foreign markets.

J. Erol: *Amendments to the Combines Investigation Act: Background Information and Explanatory Notes* (Ministry of Consumer and Corporate Affairs, 1984) at 11-12. Nevertheless, 15 years have elapsed since the Minister made such remarks and the world has evolved somewhat.

¹⁷⁸ GATS, note 22, *supra*, at 14, n. 39, which suggests that "Article 11.1 of the Safeguard Agreement prohibits countries from encouraging or supporting the adoption of maintenance by private enterprises of measures equivalent to voluntary export restraint exercised by the government. For example, when a country's government encourages the creation of an export cartel, thereby restricting the exportation of products, it is violating Article 11.1 and could be challenged by the competition authority of the exporting or importing country."; *International Draft Code Group*, note 32, *supra*, at S-3: "It is likewise important to be free of restraints launched in another nation, such as export cartels. Most nations have export cartel exemptions on the theory that injury to foreigners is of no concern to them, and the offenders commonly claim that they are beyond the jurisdictional reach of the injured nation. Yet prohibition of export cartels is in the interest of all nations; it is in the interests of world welfare and even in the narrower reciprocal interests of the exporting nation itself."

¹⁷⁹ See Part C.1(a)(2)(i).

¹⁸⁰ One other reason for removing the legislative exemption is that it is complicated and fraught with danger in relation to technical violations, thereby imposing risk, uncertainty and potential costs on those who might make use of it. See *R. v. Manigo Inc.* (Jan. 14, 1988), [unreported] (Que. S.C.); *U.S. v. The Concentrated Phosphate Export Association Inc.* (1968), 89 S. Ct. 361.

¹⁸¹ See *Industrial Milk Producers Association v. Milk Board* (1988), 21 C.P.R. (3d) 33 (F.C.T.D.); *Jabour v. Law Society of B.C.*, [1982] 2 S.C.R. 307; *Home Oil Distributors v. Attorney General of B.C.* (1940), 2 D.L.R. 409 (S.C.C.); Director of Investigation and Research, *Combines Investigation Act, Annual Report for the Year Ended March 31, 1985* (Ottawa: Ministry of Supply and Services, 1985) at 51 ("Urban Transit - Province of Quebec").

¹⁸² See *Competition Act*, ss. 2.1 and 4-6.

2. Consequential Amendments

(a) Criminal Provisions: Sections 47, 49 and 61

Section 47 makes *per se* illegal any agreement or arrangement between or among two or more persons to fix bids, whether the bid prices are actually fixed or one or more of the parties thereto has simply agreed not to submit a bid. It is unlikely that the range of conduct covered by section 47 would be completely captured by subsection 45(1) of the Draft Code. For example, it is not clear that subsection 45(1) of the Draft Code would necessarily capture:

- an agreement between bidders that had not previously *competed* for tendered work or within any market;¹⁸³
- an agreement between bidders as to fixed prices that would be submitted, none of which were accepted; or
- an agreement between bidders whereby only one of them would respond to a bid, which was not accepted.¹⁸⁴

Therefore, we would maintain section 47 in its current form.¹⁸⁵

Section 49 makes *per se* illegal a number of agreements and arrangements between or among financial institutions. Under the Draft Code, much of the conduct would affect prices in a market or supply to a market. It may be appropriate to amend the provision to clarify that, for purposes of subsection 45(1), those types of conduct referred to in paragraphs 49(1)(a) to (f) shall be deemed to either affect prices or restrict supply in a market. Nevertheless, we have considered amendments to section 49 to be beyond the scope of this report.

A great lack of clarity exists as to the "border" between sections 45 and 61. On the one hand, courts have indicated that there is nothing to preclude section 45 of the *Competition Act* from operating "vertically,"¹⁸⁶ while, on the other hand, section 61 has been used to obtain convictions in relation to "horizontal" conduct between competitors.¹⁸⁷ We would amend section 61 to clarify

¹⁸³ While it is beyond the scope of this report, we note that the bid rigging provision can cause some confusion for subcontractors, where they have the ability to place independent bids but prefer to subcontract with another. Non-disclosure of the agreement between the bidder and the subcontractor may result in a breach of section 47. See note 76, *supra*.

¹⁸⁴ While it is likely that the agreement could be challenged on the basis that the *object* of it was to affect prices in a market, there is scope for arguments to be made that there was never any real intention to affect prices. See *R. v. Civil Construction Inc.* (1964), 47 C.P.R. 208 (Que. Q.B.).

¹⁸⁵ We have considered further commentary on appropriate amendments to section 47, including subsection 47(2), to be beyond the scope of this report.

¹⁸⁶ CGE, note 91, *supra* (vertical conspiracy alleged, albeit unsuccessfully); PANS, note 12, *supra*, at 16: "In my view, it is not necessary that a combination, agreement or arrangement be strictly horizontal in order for it to offend s. 32 [now 45]."

¹⁸⁷ See *R. v. Campbell* (1979), 51 C.P.R. (2d) 284 (B.C.Co.Ct.); *R. v. Schelew* (1984), 78 C.P.R. (2d) 102 (N.B.C.A.); *R. v. Mr. Gas*, (1996) [unreported] (Ont. C.J.), *rev'd* [1999] O.J. No. 3686 (Ont. C.A.); Chandler & Jackson, note 9, *supra*, at 6-7. See also B.M. Graham, "Horizontal Restraints - Canada and the United States" (Address to the Canadian Institute, 10 March 1994) [unpublished] at 4, who argues that the legislative history of section 61 supports its application to vertical restraints only; Bureau of Competition Policy, Consumer and Corporate Affairs Canada, *Background Papers, Stage 1, Competition Policy* (Ottawa: Supply and Services Canada, April, 1976) at 55: "Since the Act no longer refers to a dealer requiring resale at a specified price, the prohibition applies equally to a person attempting to influence upward a selling price of a product irrespective of whether that person is the supplier of the product. It might apply, for example, to a

that it is to operate only in relation to vertical relationships. The wording of such an amendment, as well as the other recommended amendments in this Part, is beyond the scope of this report.

(b) Civil Provisions: Sections 77-79, 85-90 and 92

77 (1)

...

"market restriction" means any agreement or arrangement that:

- (a) has had the effect of substantially lessening or preventing competition in any market, or**
- (b) if entered into, or implemented, will have, or will likely have, the effect of substantially lessening or preventing competition in any market, and includes agreements between or among competitors, suppliers, customers or other persons, or among any of them;**

...

(3) Where, on application by the Commissioner, the Tribunal finds that a market restriction has, or is likely to, substantially lessen or prevent competition in any market, the Tribunal may make an order containing any requirement that, in its opinion, is necessary to restore competition in such market or avoid such lessening or prevention of competition.

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

...

- (1) requiring a customer, as a condition of supplying a product to the customer, that the customer supply any product only in a defined market, or exacting a penalty of any kind from the customer if the customer supplies any product outside a defined market;**

We would place all agreements or arrangements that substantially lessen or prevent competition in a civil "basket" provision to enable the Commissioner to take action to void such agreements and arrangements. The basket clause would capture certain agreements and arrangements that do not fall within subsection 45(1) of the Draft Code, including those which:

- do not involve competitors; and
- are ancillary to another agreement or arrangement and could not reasonably have been foreseen to substantially impact upon competition at the time of their completion.

In order to accommodate the basket clause, which we feel is aptly named a "market restriction," we would reshuffle the existing market restriction provision to ensure that it was covered under the abuse of dominance provision.

With respect to "specialization agreements," which have a defined meaning within the *Competition Act*, we would delete these provisions altogether.¹⁸³ Given the need to register a specialization

situation where one supplier of a product sought by agreement to influence upward the price at which his competitor supplied the same or similar products."

¹⁸³

Section 85 of the *Competition Act* defines a specialization agreement as: "[A]n agreement under which each party thereto agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into on condition that each other party to the agreement agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into, and includes any such agreement under which the parties also agree to buy exclusively from each other the articles or services that are the subject of the agreement." In Europe, the *Block Specialisation Agreement Exemption*,

agreement in a public place and expose oneself to the twofold risk that (i) once placed before the Tribunal, others will seek leave to intervene¹⁸⁹ and complain about the arrangement, and (ii) if not registered, the Commissioner may investigate the agreement under section 45, it is not surprising that the provision has been "an unmitigated failure."¹⁹⁰ Moreover, the definition is rather narrow and fails to include numerous efficiency-enhancing ventures that are similar in substance to the defined phrase.¹⁹¹ We believe that such agreements ought to be handled in the first instance by the Commissioner and, if a clearance certificate is denied, access to the Tribunal through the appeal mechanism in the Draft Code would be available.

The "border" between sections 45 and 92 is also unclear. Unlike our American counterparts,¹⁹² we have drafted such a broad definition of the term "merger" in the *Competition Act* as to virtually ensure that there is great overlap between cooperative and concentrative ventures, using European terminology.¹⁹³ In light of the broad wording of the "basket" clause in the Draft Code (*i.e.*, subsection 77(1)("market restriction")), we would amend section 92 to capture only acquisitions of assets (including interests in combinations) and shares and exempt such acquisitions from challenge under subsection 45(1).¹⁹⁴ Long-term leases of assets, joint ventures in the nature of those set forth in section 112 and other forms of cooperative behaviour would thereby be removed from section 92, which would lead to an improvement in the overall design and operation of the *Competition Act*.

(c) Other Provisions: Sections 29 and 32

Section 32 provides the Attorney General with the right to apply to the Federal Court for certain orders pertaining to intellectual property rights. In particular, where *use has been made of the rights granted under patent, trademark or copyright laws so as to unduly impact on competition*, certain orders may be made to remedy the abuse. Section 32 has been used in less than a handful of instances, notwithstanding its creation in 1910.¹⁹⁵ Since section 32 is dependent upon a substantial impact on competition, we believe the contents of section 32 ought to be incorporated within the reviewable practices part of the *Act*. As previously mentioned, we would also contemplate the confidentiality provision being expanded to cover all information provided to the Commissioner in

note 72, *supra*, also exempts such agreements, as well as agreements to manufacture products jointly and unilateral specialization agreements.

¹⁸⁹ See *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 9(3).

¹⁹⁰ M.J. Trebilcock, *et al.*, *The Law and Economics of Canadian Competition Policy* [Draft], Chap. 3 at 50 (hereafter "*Trebilcock*"). One of the authors has encouraged a client to register an agreement that clearly fell within the four corners of section 85. Aside from the risks, the client was also concerned about the costs involved in the process.

¹⁹¹ For example, the definition only embraces agreements to rationalize *existing* production. Kennish & Ross, note 2, *supra*, at 23; Trebilcock, *ibid.*

¹⁹² Under the *Clayton Act*, 15 U.S.C. §7, only acquisitions of shares and assets are captured.

¹⁹³ "Concentrations" are "deemed to arise where: (a) two or more previously independent undertakings merge, or (b) one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect, control of the whole or parts of one or more other undertakings." Concentrations are dealt with as mergers under Article 82 of the *Treaty of Rome*. Cooperative ventures, on the other hand, are joint ventures which do not constitute "concentrations." See "Council Regulation on the Control of Concentrations Between undertakings," found at http://europa.eu.int/comm/competition/mergers/legislation/c406489_en.pdf (accessed on Aug. 7, 2001); see also *European Commission Notice on Cooperative Joint Ventures*, note 64, *supra*, at ¶¶ 9-11. See also note 141, *supra*.

¹⁹⁴ See Part C.1(b)(4).

¹⁹⁵ An illustrative example of such abuse was demonstrated in a non-section 32 case, *Canada v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), where use was made of a U.S. patent to extend the respondent's market power into Canada, where the respondent's patent had previously expired.

respect of a clearance certificate request.¹⁹⁶

D. SUMMARY AND CONCLUSIONS

The Canadian record in the enforcement of conspiracies is not impressive. The total number of cases in which the Crown has advanced proceedings does not significantly exceed the number of years in which the law has been available for prosecution, while the total number of cases in which the Crown has *successfully* litigated a conspiracy case is less than 30. Moreover, during the last 25 years the Crown lost all seven litigated cases that did not involve a monopoly or "virtual monopoly." While the expenditure of resources on conspiracies that do not materially harm our economy is of concern in any effort to reform the law,¹⁹⁷ on balance the economic thinking tends to support a *per se* approach to "hard core" cartel behaviour.

Accordingly, we believe that amendments to the law of conspiracy are necessary and, consistent with other provisions of the *Competition Act*, such as sections 47, 49 and 61, we would make certain types of conspiratorial conduct *per se* illegal. We have attempted to outline a workable model for legislative reform in this report, which we have termed the Draft Code, which features the following basic structural components:

- (1) A *per se* net capturing only a limited category of agreements and arrangements having the object or effect of affecting prices, output, expansion, entry, customers or suppliers in respect of a market;
- (2) A broader civil net enabling the Commissioner to take action against all agreements or arrangements having the effect of substantially affecting competition, regardless of whether or not such agreement or arrangement falls within the *per se* net;
- (3) An automatic release from the *per se* net of certain types of agreements and arrangements arising from transactions that are not aimed at harming competition and could not be reasonably foreseen to harm competition; and
- (4) A clearance mechanism enabling the Commissioner to develop block exemptions reflecting current economic and legal thinking with regard to conspiracies, as well as release specifically notified and socially desirable agreements or arrangements from the *per se* net.

Certain consequential amendments flow from the Draft Code, which are largely outside the scope of this report.

¹⁹⁶ Note 154 and 175, *supra*.

¹⁹⁷ While one could argue that the resources are not completely wasted, since the litigation process itself is a deterrent, the offsetting factor is the impact on the behaviour of the business community of the unsuccessful prosecution. The net effect is difficult to assess in the abstract.



APPENDIX 1: The Study

Glossary

A - Name of Case (R. v.)
 F - Market Share of Participants
 G - Length of Alleged Conspiracy (Months)
 I - Union Effect on Comp.
 E - Type
 PF - Price Fixing
 MA - Market or Customer Allocation
 OL - Output or Supply Channel Restrict

ufs - unavailable
 ufs not applicable

A	B	C	D	E	F	G	H	I	J	K	L	M
Case, R. v.	Date	No of Participants	Product / Service	Geog. Scope	Int. Share	LoC	Prod of Agent	Uniq. Effect	Rebut	Type	Trans. Method	Notes
1	Elkoff	1A	coal	ONT	100%	u/s	Yes	Yes	Com.	OL, PF	Yes	Ontario Coal Association: Fixed local price and restricted member-dealers from purchasing coal from producers selling direct to consumers.
2	Central Supply Ass'n Ltd.; Master Plumber and Steam Fitters Association; McMichael	1A	plumbing supplies	Toronto	>80%	28	Yes	Yes	Com.	OL	Yes	Master Plumbers and Steamfitters Association: Member-dealers required suppliers of plumbing and steamfitter supplies to not deal with non-members.
3	Clarke	1A	lumber	ALB	u/s	u/s	Yes	Yes	Com.	OL, PF	Yes	Alberta Retail Lumber Dealers Association: Fixed prices of lumber locally and prohibited suppliers from selling to non-members.
4	Gage	1A	grain	MAN	V.M.	192	Yes	No	Acq	PF	Yes	By-laws of grain associations, and agreements between associations, requiring member-dealers to set minimum commission on purchasing / selling grain.
5	Beckall	1A	groceries	ONT	95%	81	Yes	No	Acq	PF	Yes	Wholesale Grocers' Association By-laws: Member-dealers established negative for grocery wholesalers and required suppliers to sell to the retail level only at higher set prices.
6	Canadian Wholesale Ass'n.	1A	groceries	u/s	u/s	u/s	u/s	u/s	Acq	PF	Yes	Wholesale Grocers' Association: agreement fixing prices. Defence: constitutional / legal challenge - successful.
7	Singer et al.	TU	plumbers	ONT	u/s	u/s	Yes	Yes	Com.	OL, PF	Yes	Unaffiliated Builders' Council: Manufacturers, jobbers and master plumbers' council fixed prices and required members to buy plumbing supplies only from other council members. Defence: trade union legislation - unsuccessful.
8	Stinson-Rueh Builders Supply Co. Ltd.	6-W/O and 4-Profns	gypsum	Manitoba	100%	12	Yes	Yes	Com.	OL, PF	No	Producers and distributors formed association to fix wholesale and retail prices of gypsum with exclusive purchases and supply agreements.
9	Alexander Ltd.	16	electrical contractors	Toronto	u/s	26	Yes	Yes	Com.	MA, PF	No	Electrical Estimators Association: pre-qualified bids to be tendered on electrical work using "average bid" formula. Protected contractors in relation to established customers.
10	Famous Players	100s	motion films	ONT	u/s	84	No	No	Acq	OL, PF	Yes	Standard terms of industry-wide contracts, as opposed to prices, were fixed. Agreement to protect certain class of theatres from competition on new releases for limited period of time.
11	Canadian Import Co.	5	coal	QNE	70% of Welsh Imports	72	Yes	Yes	Com.	OL, MA, PF	No	Agreement to no longer import Russian-sourced coal, fixed wholesale and retail prices of Welsh coal, and allocated customers to achieve equal market share.
12	Container Materials Limited et al.	19	fireboard houses	CAN	V.M.	75	Yes	Yes	Com.	OL, PF	Yes	Joint venture marketing company established by producers as exclusive selling agent.
13	Imperial Tobacco Co. et al.	40	tobacco products	u/s	u/s	u/s	u/s	u/s	Com. (Rev'd on Appeal)	u/s	u/s	Trial case not reported or available.
14	Ash-Temple Co.	11-W/O and 7-Profns	dental supplies	CAN	u/s	294	No	No	Acq	OL, PF	u/s	Canadian Dental Trade Association: Manufacturers and dealers fixing wholesale and retail prices with exclusive supply arrangements to association members.

Gourley Report

Cash, R. v.	Date	No of Participants	Product / Service	Goods Bought	Ind. Share	Proof of Agmt.	Unilateral Effect	Impact	Type	Inter-Participant	Notes
15 McGavin Bales et al.	1961	3 Prod. / many WDOs	baleary goods	MAN, ALB, BC	40% to 75%	Yes	Yes	Yes	PF, MA	Yes	Master Bales' Association: fixing and maintaining prices, allocating markets and establishing rotating tender system.
16 Crown Zellerbach Canada Ltd.	1955	10	paper products	BC	V.M.	Yes	Yes	Yes	PF, MA	Yes	Paper Distributors' Council: facilitated allocation of markets through "zones" and fixed bid prices.
17 Northern Electric Co. Ltd.	1956	10	copper wire & cable	CAN	V.M.	Yes	Yes	Yes	PF	No	"Circulating Memoranda" were used to effect price fixing.
18 Dominion Steel and Coal Corp. Ltd.	1956	6	steel wire fencing	ONT, QUE	V.M.	Yes	Yes	Yes	PF	No	Uniform prices and terms of sale in conjunction with meetings and exchanges of price lists.
19 Morrey et al.	1956	25	gasoline	Varic.	V.M.	Yes	No	Quashed on Appeal	PF	u/a	Gasoline station operators agreed to fix retail sale price of gasoline.
20 Howard Smith Paper Mills Ltd. et al.	1957	27	fine paper	CAN	V.M.	Yes	Yes	Yes	OL, PF	No	Canadian Pulp & Paper Association (mill association) and Canadian Paper Trade Association (merchant association): agreement to fix prices and adopt standards terms; agreement on class of recognized paper merchants.
21 Abitibi Power & Paper Co. Ltd.	1960	18	pulpwood	ONT, QUE, NB	74%	Yes	Yes	Yes	PF	Yes	Buying Group: agreement to fix maximum prices at which pulpwood would be purchased by participants.
22 Electrical Contractors Ass'n of Ontario and Ont.	1961	TA	electrical equipment	ONT	<50%	Yes	Yes	Yes	PF	Yes	Electrical Contractors' Association: only permitted sale at wholesale prices to members.
23 Lyons Fuel Hardware & Supplies Ltd.	1961	3	coal	Sault Ste. Marie (ONT)	100%	Yes	Yes	Yes	PF	Yes	Identical bids to captive customers (public institutions).
24 Burrows et al.	1966	11	mandarin oranges	ONT to BC	up to 90%	Yes	Yes	Yes	OL, PF, MA	No	Restricted imported mandarin oranges from Japan, as well as fixed prices and allocated markets through exclusive territories.
25 Canadian Coal & Apron Supply Ltd.	1967	TA	lowlands and uniform rentals	Montreal	85-90%	Yes	Yes	Yes	PF, MA	u/a	Montreal League of Union Supply Owners Company: Fixed prices and entrenched existing customer relationships.
26 J.J. Beaman Construction Co. Ltd. et al.	1967	12	asphalt and aggregate	ONT	u/a	Yes	Yes	Yes	PF	No	Identical price lists.
27 Canadian Warehousing Assoc. et al.	1968	300	transportation and storage of household goods	Domestic	u/a	Yes	Yes	Yes	PF	Yes	Identical price lists.
28 St. Lawrence Corp.	1969	15	paperboard and paperboard boxes	CAN	V.M.	Yes	Yes	Yes	PF	No	Fixed prices through price manuals.
29 B.C. Professional Pharmacists' Society	1970	2	Pharmaceutical Services	BC	<75%	Yes	Yes	Yes	PF	Yes	Pharmacist Society resolving to impose surcharge.
30 J.W. Mills & Son Ltd. et al.	1970	4	Freight forwarding services	CAN	85%	Yes	Yes	Yes	PF, MA	No	Agreement to end rate war and to maintain rate differential for limited time, as well as not to poach other's customers.
31 Canada Cement Lafarge Ltd.	1973	12	cement	Toronto	99%	Yes	Yes	Yes	PF	u/a	Accused all using "base freight factor" pricing system. Successful conscious parallelism defence.
32 Allied Chemical Canada Ltd.	1975	2	sulphuric acid	BC	<100%	Yes	Yes	Yes	OL, PF	Yes	Agreement between involuntary and voluntary producers of sulphuric acid whereby voluntary producer shut down operation in favour of supply agreement from involuntary producer.
33 Arden Business Forms Ltd. et al.	1975	15	business forms	CAN	>75%	Yes	Yes	Yes	PF	Yes	Institute of Business Form Manufacturers: facilitated exchange of price lists between competitors; actual prices offered from list.

Gourley Report

Case, R. v.	Year	No. of Participants	Product / Service	Drug / Health Product	Market Share	Litigation	Settlement	Acq.	Q. MA, PF	Other	Notes
34 Atlantic Sugar Refineries Ltd. et al.	1975	15	sugar	CAN	V.M.	181	No	n/a	Acq.	PF	Identical price list, actual prices differed from list. Allegations that parties agreed to maintain traditional market shares and limit imports of Indian sugar. Successful conscious parallelism defence.
35 Aluminum Co. of Canada	1975	6	aluminum	CAN	>80%	5	No	No	Acq.	PF	Identical price list, actual prices differed from list. Allegations that parties agreed to maintain traditional market shares and limit imports of Indian sugar. Successful conscious parallelism defence.
36 Amoco Canada Ltd.	1976	10	metal pipe	ONT, QUE	n/a	57	Yes	Yes	Conv.	PF	Identical sales plans by competitors that were not published and circulated.
37 Canadian General Electric Company Ltd. et al.	1976	3	lamps	CAN	85%	104	Yes	Yes	Conv.	PF	Identical sales plans by competitors that were not published and circulated.
38 Aetna Insurance Co. et al.	1977	73	insurance	NS	83% to 87%	132	Yes	No	Acq.	PF, MA	Board of underwriters setting the insurance rates.
39 Lebedev Concrete Products Ltd.	1979	5	concrete	Lebedev (AB)	>80%	97	No	n/a	Acq.	PF	Conspiracy alleged to fix the purpose of obtaining information from competitor with no intention to abide by terms.
40 Broomfield-Fair Industries of Winnipeg	1980	2	webb disposal service	MM	<50%	24	n/a	n/a	Acq.	PF	Allegation of accused agreeing on reasonableness of price schedule. Nonfrivolous competition confined with discounts being offered.
41 Canadian Motors Ltd.	1980	4	car parts	Perth (BC)	n/a	72	Yes	No	Acq.	PF	Agreement to follow pricing formula for end-user parts.
42 B.C. Television Broadcasting System Ltd.	1980	10	commercial broadcasting	BC	>80%	17	Yes	No	Acq.	PF	Agreement to provide discount only to accredited ad agencies.
43 Contico Ltd.	1980	6	refrigerator	CAN	<100%	128	No	n/a	Acq.	PF	Identical or similar retail prices. Successful conscious parallelism defence.
44 Albany Fuel Co. of Canada	1982	13	fuel oil	ONT, QUE	>80%	268	Yes	Yes	Conv.	Q. MA, PF	Association conspired to fix prices and limit oil imports. World wide market allocation with unrestricted co-conspirators.
45 Thomson Newspapers Ltd.	1984	3	n/a	n/a	n/a	n/a	Yes	n/a	Acq.	Q. MA	First case not reported or available.
46 B.C. Fruit Growers Ass'n	1985	15	fruit storage	BC	90%	60	Yes	No	Acq.	Q. MA	Accused fruit storage and packaging houses agreeing with B.C. Fruit Growers Association to handle first city of association members.
47 Metropolitan Toronto Pharmacists Ass'n	1986	1A	Pharmaceuticals	Toronto	n/a	12	Yes	No	Acq.	Q. MA	Toronto Pharmacists Association reached and urged member pharmacists to opt out of third party insurance pre-payment plan on the basis of a dispute over fee formula.
48 Davis Spence Ltd.	1986	13	car mechanic labour rates	Fort Erie (ONT)	V.M.	18	No	No	Acq.	PF	Allegation agreement to fix rates. Court noted the countervailing power of customers (i.e. auto insurance companies).
49 Canada Packers Inc. et al.	1986	54	hogs and pork products	Western Canada	<50%	137	No	No	GP / Acq.	PF, MA	No intention to be bound by decisions re. value of hogs; allegations re. market share maintenance.
50 Manitoja et al.	1988	11	edible lin	QUE	100%	40	Yes	Yes	Conv.	PF	Export cartel, defence not available where agreement restricted export sales.
51 Nova Scotia Pharmaceutical Society	1990	1A	Pharmaceuticals	NS	80%	150	Yes	Yes	Acq.	PF	Price fixing involving maximum prices and agency appointments amongst competing pharmacists.
52 Carls Transport Canada Inc.	1995	15	Freight forwarding services	CAN	n/a	135	Yes	No	Acq.	PF, MA	Agreement to eliminate price cutting and protection of existing customer relations.
53 Bayda and Associates Surveys Inc.	1997	6	Real estate property reports	Estimote	n/a	10	No	n/a	Discharge	PF	Allegation price fixing of residential property reports.



APPENDIX 2: The Draft Code

Proposed Sections 45 and 46

Conspiracy

45. (1) Every one who enters into an agreement or arrangement with one or more other persons for the purpose or having the effect of:

- (a) fixing, stabilizing or otherwise affecting prices in or of a market,
- (b) eliminating or restricting capacity, output or supply in, of or to a market,
- (c) impeding expansion or entry in, of or into a market, or
- (d) allocating, ceasing to supply or purchase, or otherwise affecting relations of either or any of them with one or more of any of their customers in, or suppliers to, a market,

where those persons or their affiliates, or two or more of them, compete in the market, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding [x] or to both.

Foreign Persons

(2) For purposes of certainty, any person that enters into an agreement or arrangement referred to in subsection (1) for the purpose or having the effect of affecting, in the manner set forth in any of paragraphs (1)(a), (b), (c) or (d), any market wholly or partially within Canada, irrespective of whether or not the person or any of the persons to the agreement or arrangement is located or has a presence in Canada, is guilty of the offence.

Evidence of Conspiracy

(3) In a prosecution under subsection (1), the court may infer the existence of an agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the agreement or arrangement must be proved beyond a reasonable doubt.

Exception

(4) Subsection (1) does not apply in respect of an agreement or arrangement:

- (a) between or among federal financial institutions that is described in subsection 49(1),
- (b) that is entered into only by persons each of which is, in respect of every one of the others, an affiliate,
- (c) or an effect that is ancillary ("ancillary agreement or effect") to another agreement or arrangement ("principal agreement"), including an agreement to acquire or lease assets, that was not entered into for a principal purpose of having an effect set forth in paragraph (1)(a), (b), (c) or (d), where:

- (i) the ancillary agreement or effect is reasonably necessary to give effect to, or an integral part of, the principal agreement; and
- (ii) it was not reasonably foreseeable, at the time that the principal agreement was entered into, that competition would be substantially lessened or prevented as a result of the ancillary agreement or effect,

provided, however, that where the predominant purpose of the principal agreement is to achieve gains in efficiency the parties shall be deemed to have not entered into such agreement for a principal purpose of having an effect set forth in paragraph (1)(a), (b), (c) or (d), or

- (d) pursuant to which assets, including shares, will be acquired only, where the purpose of the agreement or arrangement is not to affect a market in any manner contemplated in paragraphs (1)(a) or (b).

Limitation

(5) No proceedings may be commenced under subsection 45(1) against a

person against whom:

(a) an order is sought under section 77, 79 or 92, or

(b) an application has been made by the Commissioner under section 83 for an order against that company or any other person

on the basis of the same or substantially the same facts as would or have been alleged in proceedings under section 77, 79, 83 or 92, as the case may be.

(6) For purposes of paragraph (4)(b),

(a) one corporation shall be deemed to be affiliated with another corporation if one of them holds securities carrying, or that may be forthwith converted into securities carrying, sufficient voting rights that may be cast to elect directors of the other so as to, without consideration of other factors, control or constitute a significant interest in such other;

Deemed Purpose

(b) one partnership shall be deemed to be affiliated with another person if the person holds a sufficient interest that entitles the person to receive profits of the partnership or its assets on dissolution so as to, without consideration of other factors, control or constitute a significant interest in the partnership;

(c) if two corporations or partnerships are affiliated with the same corporation or partnership at the same time pursuant to paragraphs (a) or (b), they are deemed to be affiliated with each other.

Extended Meaning of "affiliate"

(7) For purposes of paragraph (4)(d), where the consideration for assets that are the subject of an agreement or arrangement does not substantially exceed the fair market value of such assets, in the aggregate, the parties shall be deemed, in the absence of evidence to the contrary, to have not entered into such agreement or arrangement for the purpose of affecting a market in any manner contemplated in paragraphs (1)(a) or (b).

Certificate

46. (1) Any person that is, or may become, a party to a proposed or completed agreement or arrangement may apply to the Commissioner for a certificate that the agreement or arrangement is exempt from subsection 45(1) and, if issued, such agreement or arrangement shall be exempt from the application thereof.

Conditions may be Attached

(2) A certificate under subsection (1) may be issued:

(a) with or without an expiry date and, if issued with an expiry date, the applicable agreement or arrangement shall no longer be exempt from subsection 45(1) subsequent to the expiry date, unless a further certificate is obtained under subsection (1);

(b) subject to certain conditions, including the condition that the agreement or arrangement be modified prior to it being entered into or within a certain period of time, in which event the agreement or arrangement shall only be exempt from subsection 45(1) if such condition or conditions are met.

Deemed Certificate

(3) Where an application is made under subsection (1) prior to the agreement or arrangement being entered into or having effect, the Commissioner shall respond within 60 days, failing which the certificate shall be deemed to have been granted.

Appeal

(4) Where the Commissioner refuses to grant a certificate under subsection (1) or grants the certificate subject to an expiry date or one or more

conditions:

the applicant may apply to the Tribunal for a hearing of the matter, if the agreement or arrangement is proposed; and
the applicant may not apply to the Tribunal for a hearing of the matter, if the agreement or arrangement is completed;
and where the applicant may not apply to the Tribunal for a hearing of the matter the decision of the Commissioner is final and not subject to review.

Order of Tribunal

(5) Upon a hearing of the matter under paragraph (4)(a), the Tribunal shall consider whether or not the proposed agreement or arrangement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any likely prevention or lessening of competition that will result from the proposed agreement or arrangement and may make such order as it deems fit.

Block Certificates

(6) The Commissioner may exempt from subsection 45(1) any class of agreement or arrangement as the Commissioner deems appropriate and, if issued, any agreement or arrangement falling within such class shall be exempt from the application thereof.

Failure to Disclose Facts

(7) Notwithstanding subsection (1), where the applicant has failed to disclose material facts or otherwise misled the Commissioner in any material respect, a certificate issued thereunder shall be void and of no effect.

Proposed Sections 77, 78 and 79

Definitions

77. (1) For the purposes of this section,
"exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to
(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or
(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

"exclusive dealing"
«exclusivité»

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

"market restriction" means any agreement or arrangement that:

(a) has had the effect of substantially lessening or preventing competition in any market, or

"market restriction"
«limitation du marché»

(b) if entered into, or implemented, will have, or will likely have, the effect of substantially lessening or preventing competition in any market, and includes agreements between or among competitors, suppliers, customers or other persons, or among any of them;

"tied selling"
«ventes liées»

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying

the product (the "tying" product) to a customer, requires that customer to
(i) acquire any other product from the supplier or the supplier's nominee, or
(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

*Exclusive dealing
and tied selling*

(2) Where, on application by the Commissioner, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market, with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Commissioner, the Tribunal finds that a market restriction has, or is likely to, substantially lessen or prevent competition in any market, the Tribunal may make an order containing any requirement that, in its opinion, is necessary to restore competition in such market or avoid such lessening or prevention of competition.

*Where no order to be
made
and limitation on
application of order*

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

*Where company,
partnership or sole
proprietorship
affiliated*

(5) For the purposes of subsection (4),

(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership,

sole proprietorship or a company if both are controlled by the same person; and

(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F).

*When persons
deemed to be
affiliated*

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(a);

*Definition of "anti-
competitive act"*

	(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the <i>Canada Transportation Act</i>, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms; and <u>(l) requiring a customer, as a condition of supplying a product to the customer, that the customer supply any product only in a defined market, or exacting a penalty of any kind from the customer if the customer supplies any product outside a defined market;</u>
Regulations	(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations (a) specifying acts or conduct for the purpose of paragraph (1)(f); and (b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k). R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.
Prohibition where abuse of dominant position	79. (1) Where, on application by the Commissioner, the Tribunal finds that (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.
Additional or alternative order	(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.
Limitation	(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.
Superior competitive performance	(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.
Exception	(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the <i>Copyright Act</i>, <i>Industrial Design Act</i>, <i>Integrated Circuit Topography Act</i>, <i>Patent Act</i>, <i>Trade-marks Act</i> or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.
Limitation period	

**Where proceedings
commenced under
section
45 or 92**

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37.



APPENDIX 3: The Current Law

Current sections 45, 45.1 and 46

Conspiracy	45. (1) Every one who conspires, combines, agrees or arranges with another person (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product, (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.
Idem	(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.
Evidence of conspiracy	(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.
Proof of intent	(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).
Defence	(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following: (a) the exchange of statistics; (b) the defining of product standards; (c) the exchange of credit information; (d) the definition of terminology used in a trade, industry or profession; (e) cooperation in research and development; (f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media; (g) the sizes or shapes of the containers in which an article is packaged; (h) the adoption of the metric system of weights and measures; or (i) measures to protect the environment.

Exception	(4) Subsection (3) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following: (a) prices, (b) quantity or quality of production, (c) markets or customers, or (d) channels or methods of distribution, or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.
Defence	(5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.
Exception	(6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product; (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or (c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada. (d) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 30]
Defences	(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public (a) in the practice of a trade or profession relating to the service; or (b) in the collection and dissemination of information relating to the service.
Exception	(7.1) Subsection (1) does not apply in respect of an agreement or arrangement between federal financial institutions that is described in subsection 49(1).
Exception	(8) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate. R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714.
Where application made under section 79 or 92	45.1 No proceedings may be commenced under subsection 45(1) against a person against whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in proceedings under that subsection. R.S., 1985, c. 19 (2nd Supp.), s. 31.
Foreign directives	46. (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is

for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

Limitation

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Commissioner under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

R.S., 1985, c. C-34, s. 46; R.S., 1985, c. 19 (2nd Supp.), s. 32; 1999, c. 2, s. 37.

Current Sections 77, 78 and 79

Definitions

77. (1) For the purposes of this section, "exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

"exclusive dealing"
«exclusivité» (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

"market restriction"
«limitation du
marché»

"market restriction" means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

"tied selling"
«ventes liées»

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Exclusive dealing
and tied selling

(2) Where, on application by the Commissioner, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market, with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Commissioner, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Where no order to be made and limitation on application of order

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

(5) For the purposes of subsection (4),

(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

Where company, partnership or sole proprietorship affiliated

When persons

*deemed to be
Affiliated*

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F).

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(a); and

(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

*Definition of "anti-
competitive act"*

Regulations

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

(a) specifying acts or conduct for the purpose of paragraph (1)(f); and

(b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.

Prohibition where abuse of dominant position	79. (1) Where, on application by the Commissioner, the Tribunal finds that (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.
Additional or alternative Order	(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.
Limitation	(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.
Superior competitive performance	(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.
Exception	(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the <i>Copyright Act</i>, <i>Industrial Design Act</i>, <i>Integrated Circuit Topography Act</i>, <i>Patent Act</i>, <i>Trade-marks Act</i> or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.
Limitation period	(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.
Where proceedings commenced under section 45 or 92	(7) No application may be made under this section against a person (a) against whom proceedings have been commenced under section 45, or (b) against whom an order is sought under section 92 on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be. R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37.

APPENDIX 4: Examples

Example (1): *Credit Risk Cutoff Agreement*

Assumed Facts: X and Y, both competitors in the manufacture of Widgets, agree to cease doing business with Z, a customer of both, because of poor credit ratings.

Discussion: While the *object* of the agreement may have been to eliminate credit risk, nothing prevented the competitors from arriving at their decision to cease supplies on a unilateral basis; as such, the agreement falls within subsection 45(1) and ought to be prosecuted on the basis that agreements between competitors with respect to customers should, in the absence of a clearance certificate from the Commissioner, never be condoned.

Example (2): *Buying Group*

Assumed Facts: X and Y, two competitors, form a corporation to function as a buying agent with respect to a select group of inputs required by them in the manufacture of Widgets.

Discussion: Under subsection 45(1), the agreement to form and operate the corporation as a buying group clearly would have the object of fixing prices paid to buyers, but because X and Y do not appear to compete in the market to which the purpose or effect of the agreement relates the agreement may not fall under paragraph 45(1)(a). Since the agreement is designed to affect relations with suppliers, however, the agreement would be caught within paragraph 45(1)(d). Nevertheless, generally we believe that such agreements are more properly approached from an abuse of joint dominance or civil conspiracy perspective and, in this regard, either section 77 or 79 could be invoked were the arrangement to have a substantial impact on competition. We would hope that a block exemption would be issued to confirm our intended approach were the Draft Code to be adopted.¹⁹⁸

Example (3): *Vertical Conspiracy*

Assumed Facts: Z, a supplier of Widgetane, agrees to cut off supplies to Y, a new entrant in the Widgetane distribution market in B.C., upon being pressured to do so by X, the dominant distributor in such market.

Discussion: The agreement between X and Z would not be caught in subsection 45(1) of the Draft Code because the parties thereto are not competitors. The conduct of X and Z could be addressed under section 77 (of the Draft Code), section 79 (of the *Competition Act*) and the civil tort of conspiracy; subsections 61(1) and (6) (of the *Competition Act*) might also apply depending upon the circumstances.¹⁹⁹

¹⁹⁸ See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1953* (Ottawa: Ministry of Supply and Services, 1953) at 17 ("The Maple [Sugar] Report"). Many American cases also reflect greater deference to cooperative buying groups because, on their face, the object of the agreement is to lessen costs and enhance administrative efficiencies, rather than harm the economy. See *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* (1985), 472 U.S. 284 at 295; *All Care Nursing Service v. High Tech Staffing Services* (1998), 135 F.3d. 740 (11th Cir.), cert. denied 1999 U.S. Lexis 1892; *Langston Corp. v. Standard Registry Co.* (1982), 553 F.Supp. 632 (N.Dist. Ga.).

¹⁹⁹ See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1965* (Ottawa: Ministry of Supply and Services, 1965) at 26 ("Report in Connection with the Production, Distribution and Sale of Propane in British Columbia").

Example (4): Non-Compete in Lease

Assumed Facts: Assume that X leases space from Y in a shopping mall for the purpose of offering Widget services to customers. In the lease, Y agrees not to lease any other space in the shopping mall to a person that would compete with X.

Discussion: Since X and Y are not competitors, subsection 45(1) does not apply; if the restraint had the effect of *preventing* competition, the Commissioner could bring an application to the Tribunal pursuant to section 77 (of the Draft Code).

Example (5): Supply Contract

Assumed Facts: X and Y both produce Widget Sludge. Widget Sludge is produced as a by-product of X's operations (non-discretionary production), while Y produces Widget Sludge from a chemical reaction (voluntary production). X offers to sell Widget Sludge to Y in lieu of Y continuing to produce the product itself.

Discussion: Under the Draft Code, a simple product purchase and sale agreement would not normally fall subject to subsection 45(1), unless it was a condition of the agreement (either explicitly or implicitly) that the buyer eliminate or restrict output. It is possible, however, that the overall arrangement would be viewed as one in which X clearly recognized that the supply of product to Y would lead to a restriction or elimination of output in the market. To the extent that the arrangement had such an ancillary effect and that effect was not one that *substantially* prevented or lessened competition (or, more properly, such effect was not reasonably foreseeable at the time that the supply contract was executed), the arrangement would survive attack under paragraph 45(4)(c), since the ancillary effect is reasonably necessary or an integral part of the purchase of alternative product through Y.²⁰⁰

Example (6): Purchase of Intellectual Property

Assumed Facts: Assume that X competes with Y in the manufacture and sale of Widgetchem, along with Z - the only other producer of Widgetchem in Canada. X, which is facing significant cash flow difficulties and manufactures many other products, agrees to enter into a purchase and sale agreement with Y, whereby X will licence its Widgetchem patent to Y for a sum of money, cease to produce Widgetchem except as required by Y, disclose its customer list, assign all sales contracts, and permit Y to acquire certain marketing and technical employees of X.

Discussion: The analysis is dependent upon whether or not the principal aim of Y is to acquire the assets of X or to achieve a shutdown and non-compete agreement. If the consideration for the assets did not substantially exceed the fair market value of such assets, then Y's position that it did not enter into an agreement or arrangement for the purpose of harming competition would be bolstered. If Y's intention was not to harm competition, then the *object* of the transaction is not to eliminate or restrict output or marketing activities, but rather those effects are ancillary and reasonably necessary to, and an integral part of, the principal agreement. As such, unless it could be reasonably foreseen that competition would be *substantially* lessened or prevented as a result of the agreement, the agreement would be protected under paragraph 45(4)(c). Otherwise, where the tangible and intangible assets are really ancillary to the object of obtaining a non-compete agreement from X, subsection 45(1) would, and ought to, condemn the agreement.²⁰¹

²⁰⁰ See *Allied Chemicals*, note 12, *supra*.

²⁰¹ See Director of Investigation and Research, Combines Investigation Act, *Annual Report for the Year Ended March 31, 1971* (Ottawa: Ministry of Supply and Services, 1971) at 50 ("Construction Materials").

Example (7): Membership to Trade Association

Assumed Facts: A trade association concerned with environmental and safety issues related to the production and sale of Widgets operates an emergency response plan ("ERP") that is made available to all members. The ERP provided through the trade association greatly reduces the cost of emergency response coverage, such that access to the ERP is important for new entrants to succeed. The executive committee of the trade association determines that a new entrant, X, does not meet the financial criteria that they have established in order to benefit from and participate in the plan.

Discussion: If the object of the refusal is really to impede entry or restrict expansion of the new member, then subsection 45(1) would condemn the agreement of the executive committee to refuse such access. (We have assumed that the executive committee is comprised of competitors that compete in the same market as X, such that the agreement by the executive committee members can be viewed as an agreement among competitors.) If the object of the refusal was a genuine concern about the financial stability and increased cost of the plan were X to be admitted, yet the effect of the refusal was to impede entry or restrict the ability of X to expand, then such effects would be ancillary to the agreement. As such, the refusal would be permissible, unless it was reasonably foreseeable that a substantially lessening or prevention of competition would occur.²⁰²

Example (8): Mining Exploration, Development, Production and Marketing Joint Venture

Assumed Facts: X and Y form a mining joint venture to look for Widgetanium in British Columbia. The joint venture has been formed because X holds a prospective Widgetanium property, but has been focusing its efforts on gold and doesn't particularly wish to expend exploration funds on the search for Widgetanium. Y, on the other hand, is a Widgetanium producer. The agreement between X and Y provides for the joint exploration, development, production and marketing of Widgetanium. The world market for Widgetanium consists of only a few producers, including Y. Eventually, the property proves to host a commercial deposit and a mine is established.

Discussion: Since the marketing arrangement was imbedded in the joint venture agreement at the outset, it would operate as an *integral* part of the joint venture and, assuming that the joint venture was formed at a time when it could not have been foreseen that a mine would be discovered, there would be no reasonable basis upon which to assert that the parties ought to have reasonably foreseen an impact on competition.²⁰³

²⁰² See *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.* (1985), 472 U.S. 284; *American Society of Mech. Eng. v. Hydrolevel Corp.* (1982), 456 U.S. 556, *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra*, at ¶ 165.

²⁰³ See *Pasminco Ltd., Australian Mining and Smelting Ltd.*, [1988] ATPR (Com.) 50-082. In Europe, joint ventures concerned with production and marketing activities are generally acceptable where the parents do not have an aggregate market share in a relevant market exceeding 20% to 30% (Commission Regulation (EC) No. 2659/2000 "On the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements," found at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!JO_RefPub&lg=EN&serie_jo=L&an_jo=2000&nu_jo=304&pg_jo=0003 (Nov. 29, 2000) (hereafter "*Block R&D Exemption*") and *Block Specialisation Agreement Exemption*, note 72, *supra*); this safe harbour previously fell to 10% where the joint venture was concerned with marketing activities, but the exemptions now recognize the fact that the "joint exploitation of results [from a JV] can be considered as the natural consequence of [the JV]." *Block R&D Exemption*, Recital 11 and Art. 5(2); *Block Specialisation Agreement Exemption*, Article 5(2). See also *European Commission Notice on Cooperative Joint Ventures*, note 64, *supra*, ¶¶ 44-51, 63 and 64. In the United States, the *U.S. Competitor Collaboration Guidelines*, note 36, *supra*, which were adopted in April 2000, also establish a 20% market share safe harbour for collaborative efforts between or among competitors. It should be noted, however, that *The National Cooperative Research and Production Act of 1993*, 15 U.S.C.A. §§4301-4305, which protects certain joint ventures between or among competitors, excludes from protection any agreement or restriction "... involving the marketing ... of any product ... other than (A) the distribution among the parties to such venture, in accordance with such venture, of a product, process or service produced by such a venture."

Example (9): Specialization Agreement

Assumed Facts: X and Y both produce, distribute and market Widgetane, a liquid home heating fuel, in Newfoundland and P.E.I. Both operate terminal facilities in the two provinces, which are exclusively, but not fully utilized by them. X permits Y to utilize its terminal facilities on P.E.I. on a cost-sharing basis, while Y permits X to do the same with regard to Y's Newfoundland terminal. The arrangement permits X and Y to save resources by ceasing to operate the two unused terminals.

Discussion: Assuming that: (i) the arrangement does not have significant foreclosure effects because there are no other distributors of Widgetane thereby excluded from the market and none likely to enter (and therefore it is not reasonably foreseeable that competition would be substantially lessened or prevented) and (ii) X and Y continue to compete in all respects in the downstream distribution and marketing of Widgetane, a court ought to conclude that the object of the arrangement was to secure terminalling services from one another, with an ancillary, and reasonably necessary, effect on competition or an ancillary, but integral, restraint on competition, so as to exempt the arrangement under paragraph 45(4)(c) of the Draft Code.²⁰⁴

Example (10): Marketing Strategic Alliance

Assumed Facts: X sells Widgets only east of the Ontario / Manitoba border because of freight constraints, while Y sell Widgets only west of the Ontario / Quebec border for the same reason. In order to compete with Z, the only national player in the Widget market, X and Y form a strategic alliance to approach national accounts in competition with Z. They agree upon a pool of customers that could not be independently pursued and agree upon proposed prices that will be offered to such customers.

Discussion: The strategic alliance would violate subsection 45(1) of the Draft Code to the extent that national account customers were not viewed as a separate market²⁰⁵ and X and Y were therefore viewed as competitors in a larger Widget market. Nevertheless, assuming the negative effects of the strategic alliance were to (i) modestly stabilize prices in Ontario because of greater communications between X and Y about appropriate pricing strategy with regard to the national accounts and (ii) allocate supply to national account customers along territorial boundaries, we would anticipate that the strategic alliance would be exempt under paragraph 45(4)(c) because such effects would not likely *substantially* lessen competition (let alone be reasonably foreseen to have caused such effect). While pro-competitive effects clearly stem from the strategic alliance, namely, increased supply and enhanced expansion within the Widget market, we note that the ancillary restraints exemption in the Draft Code would not permit such pro-competitive effects to be offset against the negative competitive effects. Rather, where the negative effects were anticipated to be substantial, a clearance certificate would have to be requested.²⁰⁶

²⁰⁴ See *The Commissioner of Competition v. Ultramar Ltd.*, [2000] Comp. Trib. 4; Z. Chen and T. Ross, "Strategic Alliances, Shared Facilities, and Entry Deterrence" (Summer 2000) 31 *The RAND J. Econ.* 326. The impact would properly be categorized as a "restraint" if the parties explicitly agreed to shut down their respective unused terminals; otherwise, the impact on competition would be an obvious ancillary "effect" of the arrangement. Creating a restraint, as opposed to an effect, would tend to leave the parties more exposed to a court finding that the agreement was designed with the object of impacting on competition, although the parties ought to be able to demonstrate the true object of the arrangement regardless of form. Nevertheless, we would anticipate competition counsel seeking a clearance certificate in the case of a "restraint" for reasons of comfort and certainty; we are cognizant of the fact that the exemption of such a transaction would, in essence, render moot the process available pursuant to section 86 for specialization agreements.

²⁰⁵ See *Propane*, note 176, *supra*.

²⁰⁶ See *Broadcast Music, Inc. v. CBS* (1979), 441 U.S. 1; *NCAA v. Board of Regents of University of Oklahoma* (1984), 468 U.S. 85; *Timken Roller Bearing Co. v. U.S.* (1951), 341 U.S. 593; *U.S. v. Sealy, Inc.* (1967), 388 U.S. 350; *U.S. v. Topco Associates, Inc.* (1972), 405 U.S. 596; *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977), 433 U.S. 36; *Assn of Indep. Television Stations v. College Football Assn.* (1986), 637 F. Supp. 1289

Example (12): Newco Marketing Agent

Assumed Facts: A number of producers of Widgets establish a corporation ("Newco") for the purpose of more efficiently marketing and selling their products. Each of the producers is a shareholder and entitled to a seat on the board of the company.

Discussion: Clearly, the purpose of the arrangement is to allocate customers to Newco and, perhaps, indirectly affect prices in the market. Moreover, the agreement or arrangement does not involve a bald or naked acquisition of shares; rather, in order for the agreement or arrangement to work, there must be a supply commitment to Newco, which would remove the agreement or arrangement from the exemption set out in paragraph 45(4)(d). It would be open to the producers to seek a clearance certificate from the Commissioner, which might be forthcoming were the producers able to demonstrate significant efficiencies and little risk of any impact on competition.²⁰⁹

²⁰⁹

See *Container Materials*, note 12, *supra*; Director of Investigation and Research, *Combines Investigation Act, Annual Report for the Year Ended March 31, 1971* (Ottawa: Ministry of Supply and Services, 1971) at 50 ("Construction Material"); *Virginia Excelsior Mills, Inc. v. Federal Trade Commission* (1958), 256 F.2d 538 (4th Cir.); *U.S. v. American Smelting and Refining Co.*, (1960), 182 F. Supp. 834 (S.D.N.Y.); *Hudson's Bay Co. Fur Sales, Inc. v. American Legend Cooperative* (1986), 651 F. Supp. 819 (D.N.J.); *Appalachian Coals, Inc. v. U.S.* (1933), 288 U.S. 344.

Example (11): Technology Research and Development Joint Venture

Assumed Facts: X is a university research center that has been developing technology with respect to hydrogen operated cars. X's efforts have been aimed at producing hydrogen fuel in liquid forms to enable wide and easy dissemination via existing gasoline fuel distribution and terminalling infrastructure. X agrees to assign exclusive rights to the technology to Y, which has also been engaging in similar research and development efforts, in return for heavy investments in capital to assist in a commercialization effort.

Discussion: Under the Draft Code, a serious question would arise at the outset as to whether or not an agreement or arrangement existed between *competitors*. Certainly, X and Y are not competitors in the resulting *product* market because it doesn't yet exist. They would be seen to be competitors in the *innovation* market to the extent that such a market would be recognized under the Draft Code and Canadian law.²⁰⁷ Assuming X and Y were properly viewed as competitors, the treatment of the joint venture under the Draft Code would depend on a few factors: (i) First, the motive of Y: If Y was principally motivated to enter into the transaction in order to tie up a potentially competing technology and thereby frustrate the attempts of X and its potential licensees from developing a position in the production and distribution of liquid hydrogen fuel, paragraph 45(1)(c) would apply and the joint venture would be *per se* illegal; (ii) If, on the other hand, several other companies were trying to develop similar technology, the risks associated with commercializing the technology were significant and the combination of Y and X enhanced the chances of success in the commercialization effort, the agreement that X would not licence any developed technology to others ought to be viewed as ancillary and reasonably necessary to the main agreement involving funding, which would be protected under paragraph 45(4)(c).²⁰⁸

(W.D.Okla.); *Palmer v. BRG of Georgia, Inc.* (1990), 498 U.S. 46; *Transocean Marine Paint Assoc'n.* [1967] C.M.L.R. D9; *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra*, at ¶ 156 (Example 1).

²⁰⁷ See U.S. Department of Justice and Federal Trade Commission, "Antitrust Guidelines for the Licensing of Intellectual Property" (April 6, 1995) at 11: "An innovation market consists of the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development."; *U.S. Competitor Collaboration Guidelines*, note 36, *supra*, at 17; *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra*, at ¶ 50, *et seq.*; but see also Competition Bureau, *Intellectual Property Enforcement Guidelines*, found at <http://strategis.ic.gc.ca/pics/ct/ipege.pdf> (accessed on Aug. 7, 2001) at 11, which suggests a contrary approach. See further C.S. Goldman and J.D. Bodrug, "Antitrust Law and Innovation - Limits on Joint Research & Development and Inter-Company Communication in Canada" (1995), 21 Can.-U.S. L.J. 127.

²⁰⁸ See Director of Investigation and Research, *Combines Investigation Act, Annual Report for the Year Ended March 31, 1973* (Ottawa: Ministry of Supply and Services, 1973) at 49 ("Synthetic Materials"); *SCM Corp. v. Xerox Corp.* (1981), 645 F. 2d 1195 (2d Cir.); see also *Berkay Photo, Inc. v. Eastman Kodak Co.* (1979), 603 F.2d 263, 299-304 (2d Cir.), *cert. denied* (1980) 444 U.S. 1093; *European Commission Notice on Horizontal Cooperation Agreements*, note 64, *supra*, at ¶ 76 (Example 2); *European Commission Notice on Cooperative Joint Ventures*, note 64, *supra*, ¶¶ 37. In the United States, the Department of Justice and Federal Trade Commission have developed a safe harbour for joint ventures aimed at research and development: "[a]bsent extraordinary circumstances, the Agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration." *U.S. Competitor Collaboration Guidelines*, note 36, *supra*, at 26-7.